NO. 8044.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ELECTRICAL RESEARCH PRODUCTS, INC., a corporation,

Appellant,

vs.

W. D. GROSS,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, FIRST DIVISION.

BRIEF FOR APPELLEE

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STATEMENT OF FACTS.

This is an action of replevin brought by the appellant against the appellee to recover possession of certain theatre equipment. The appellee answered and set up several counter-claims, on which he recovered judgment.

The appeal is prosecuted to reverse the judgment so obtained. The principal point in the case is whether the appellee was obliged to pay appellant what are referred to as service charges.

The appellee Gross, had, at the time of the trial, been engaged in the motion picture theatre business for a period of thirty-three years. He had been engaged in that business at Ketchikan ever since 1908, and at Juneau ever since 1910. He bought the property and rebuilt the present Coliseum Theatre in Juneau in about 1912, and built the present Coliseum Theatre in Ketchikan during 1924. (Pr. R. P. 317).

In about February of 1929, appellee Gross signed plaintiff's Exhibit 1, which had at that time not yet been signed by plaintiff (appellant). He sent it by mail to plaintiff's main office, and received a copy, signed by plaintiff, sometime in April, 1929. (Printed Rec. Page 317).

Plaintiff's Ex. No. 1 is a contract between the parties, in which the appellant is referred to as "Products" and the appellee as the "Exhibitor." It is upon a printed form. Some of the blank spaces, occurring in this printed form, had been filled in and others left blank at the time the contract was executed.

Under the contract "Products" agrees to install motion picture sound equipment of a designated type in the "Exhibitor's" Coliseum Theatre at Juneau, per-

form certain services with respect thereto, and to permit the "Exhibitor" to use the equipment for a period of ten years. In consideration of this the "Exhibitor" agrees to pay "Products" the sum of ten thousand five hundred ($10,500) dollars.

The agreement is long and contains many provisions, among others, the following:

Paragraph 2 provides in part as follows: "Also, in order further to secure proper functioning of the equipment as aforesaid, satisfactory to the parties hereto, it is agreed that all additional and renewal parts and assembled parts for the equipment shall be obtained from Products."

Paragraph 4, which is entitled, "Instruction and Inspection Service", reads as follows: "Products agrees to instruct the motion picture machine operators of the Exhibitor in the manner and method of operating the Equipment, and will issue to each operator who has, in its opinion, satisfactorily completed a course in instruction in the operation of the Equipment, a certificate to that effect. Products further agrees, in order to perfect such instruction, and also in order to superintend the operation of the Equipment, to keep in attendance at the Theatre during hours of performance and at such additional hours as may be necessary, an engineer or other person skilled in such operation for a period of one week following the day upon which the

installation is completed and the Equipment made available to the Exhibitor as ready for public exhibition. Products also agrees to make periodical inspection and minor adjustments in the Equipment after it shall have been installed. Products may from time to time install such spare and renewal parts as may, in its opinion, be necessary to the satisfactory operation and maintenance of the Equipment."

Paragraph 6, in which all the blank spaces occurring in the printed form have been left blank, is as follows: "In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term, shall be payable on the Saturday next succeeding the "Service Day" and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products' regular schedule of such charges as from time to time established. Under Products' present schedule, the service and inspection payment shall be $———— per week, which charge shall not be exceeded during the first two years of said license and thereafter for the balance of the term of said license shall not exceed the sum of $———— per week."

Paragraph 8 provides as follows: "The Exhibitor agrees to pay to Products its list installation charges

as from time to time established for any additional equipment or spare or renewal parts, furnished or supplied by Products, upon delivery thereof, and to pay the transportation charges thereon. The Exhibitor also agrees upon rendition of invoices to pay for any services rendered and expenses incurred by Products' employees in connection with and for the benefit of the Exhibitor, except for the regular periodical inspection and minor adjustment service hereinbefore provided for."

Paragraph 12 provides as follows: "The Exhibitor will permit Products, through its designated agents, engineers and mechanics, to have access to the Theatre at all reasonable hours, for the purpose of installing and from time to time for the purpose of examining and inspecting the Equipment, and will grant to Products full opportunity to make such adjustments therein and repairs thereto as, in the opinion of Products, are necessary or desirable."

Paragraph 20 provides in part as follows: "The parties hereto expressly stipulate that this agreement as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof, and that there is no other understanding, agreement or representation, express or implied, in any way limiting, extending, defining or otherwise relating to the provisions hereof or any of the matters to which the present agreement relates."

Paragraph 23, which is a typewritten addition to the printed form, reads as follows: "It is hereby agreed that a certain agreement for the installation and licensing of Western Electric Sound Projector Equipment in the Coliseum Theatre at Juneau, Alaska, between Products and the Exhibitor dated July 28, 1928, be and the same hereby is in all respects terminated." (Pr. R. P. 170 et seq.).

Plaintiff's Exhibit No. 3 is a contract between the parties differing from Exhibit No .1 in no respect except that it relates to appellee's Ketchikan Theatre instead of his Juneau Theatre.

In explaining the reason why the blank spaces in paragraph 6 were not filled in at the time the contract was executed (in this connection it must be remembered that the blank spaces were never filled in) the witness Anderson, who had signed the contracts for appellant, testified in part as follows: "In view of the uncertain situation with respect to Alaska, the plaintiff company had no knowledge at the time of the negotiation of the contracts Exhibits No's 1 and 3 of the probable cost of furnishing engineering service for the theatres in that territory; it was consequently unwilling to enter into a contract which would fix the amount of its compensation for the rendering of such service. (Pr. R. P. 169 et seq.).

Before appellee Gross had received his executed

copies of these contracts, he met the appellant's representative Gage, with whom the negotiations leading up to the execution of the contracts had been carried on, in Seattle, and he was told by Gage that the contracts had been signed with the service clause left out and that he, Gross, would have to get his own service man. (Ev. Gross, Pr. R. P. 317 et seq.). The witness Cawthorn, who was with Gross on this occasion, testifies with reference to the conversation as follows: "Mr. Gage called to Mr. Gross, we was on one side of the street and Mr. Gage on the other, met in the middle of the street. Gage informed Mr. Gross that he had got the contracts through with "Erpi" for Mr. Gross, without service charges, and congratulated Mr. Gross on his good fortune in getting equipment for Alaska, told him that the contracts had went through." (Ev. Cawthorn P. R. Page 476). There is no evidence in the Record denying or explaining this particular conversation.

In August, 1929, right after the equipment had been installed, the witness Wilcox, who was then plaintiff's manager for the Western Division and who is now its vice-president, stopped in Juneau, and was asked by the installation engineer whether, the installation having been made, it would be agreeable for him to return to Seattle. Whereupon, Wilcox told him to go as "Mr. Gross has no service with us in Alaska." (Ev. Gross; P. Rec. Page 319). The witness Louis Lemieux testifies that he was present when Wilcox made this statement. He testifies that Taylor, the installation

engineer, expressed a desire to go home and that "Wilcox told him then, if he thought he had the equipment in good running order, he could leave because Gross had no service and there was nothing to stay for." (Ev. Louis Lemieux; Rec. P. Page 802). Wilcox denies having made this statement; but in view of the fact that his having made it is so well established, he must have forgotten about it.

The witness Cawthorn, a qualified motion picture man, was asked what is meant by the term "service" when used with reference to motion pictures, by those engaged in the motion picture business. He gave this answer: " 'Service' as applied to the motion picture machines, and other machines, means to keep those machines in perfect running order, perfect conidtion." "At all times." (P. R. 473). And when asked the meaning of the term "Inspection and minor adjustments," when used by those engaged in the sound equipment business, he testifies: "Inspection could be made for any part of the theatre, that is as far as sound is concerned, the minor adjustments might mean just focusing an exciter lamp or something of that kind, not really repairing anything." (Pr. R. P. 473). The witness then testifies that "repair would be over-hauling, keeping it up," and that he would call that service; but that merely adjusting the machines would be called "minor adjustments." (Pr. R. P.P. 473-474).

The same witness then proceeded to testify that he

had operated Western Electric equipment in his theatre in Seattle, under a contract identical with that of appellee Gross, except that the service clause had been filled in showing what he had to pay, while the service clause in the contracts with Gross had been left blank. With relation to calls by service men and to the service received by him, he says: "We could get him any time of the day or night, we had his telephone number; they supplied us with the telephone number and we could always get a service man; it would not take very long to get there; those weekly visits were on service, but of course sometimes it was merely on inspection but if he found anything that needed service, he serviced it. If there were no repairs made I would call the weekly visits inspections; if the machines needed service he gave them service;" (Ev. Cawthorn; Rec. P. 475).

The witness Clayton, a motion-picture engineer, defines the terms "service" and "minor adjustment" when used by those engaged in the motion picture industry as follows: "Service" to us, means to go out into a house where the equipment is out of repair and put this equipment back into repair. That is what we call service." "Inspection and minor adjustment"—we go into a theatre and look over the equipment that is in repair, look over the equipment, make a few minor adjustments and inspect it and see it is in proper shape so in case there are some small troubles it won't be large enough to shut the equipment down altogether." (P. Rec. P. 783-784).

Mr. Wilcox, vice-president of appellant corporation, testifying with reference to the character of service furnished by appellant, in 1929 and 1930, under its contracts where service was provided for, says: "in the beginning for the first six months of operation in 1929 and 1930 we serviced once a week for the first six months; when I say a week it might have been eight days one time and six another, but approximately every ten days; the second six months and thereafter, approximately every two weeks with the exception of very large deluxe houses, with a seating capacity of upward of 1,500 seats of which there were about 150 in the United States, which were serviced every week; plaintiff also furnished a service man day or night on call whenever the theatre was running; the operator had nothing to do if anything was wrong except to call the the office and get a service man right away;" (Ev. Wilcox; P. Rec. Page 292).

After appellant's representative Gage told appellee Gross that the contracts had been signed and that he would have to get his own service man, Gross tried to get a service man in Seattle; but being unable to do so, he awaited the arrival of Taylor, the installation engineer who was to install the equipment. Upon Taylor's arrival, he told him that he had good reliable men who had grown up with the business and asked Taylor to instruct them so they would be able to take care of the equipment. (Printed Rec. Page 318).

Gross and Taylor then came to Juneau. Upon reaching Juneau, Gross found the signed copies of the contracts awaiting his arrival. He introduced Taylor to Tuckett, the manager for the Juneau theatre and to Lemieux, afterwards manager for the Ketchikan theatre. These men helped Taylor install the equipment; and as they unpacked it piece by piece, he explained the use of the various parts and instructed them in the operation, repair and upkeep of the equipment. He also left them a book of instructions, and they, on their part, procured other literature with a view of further qualifying themselves. Gross thereupon increased the salary of Tuckett and Lemieux from $150.00 per month to $250.00 per month. (See Ev. Gross; Printed Rec. P. 318; Ev. Tuckett, Printed Rec. P. 672; also Ev. Lemieux, P. Rec. P. 801).

Later Gross employed two experienced sound equipment engineers; they were the witnesses Clayton and Dalner. These men were placed in charge of two other theatres owned by Gross, in nearby Alaskan towns, with the understanding that they would render emergency service to the Juneau and Ketchikan theaters whenever called upon. (Ev. Clayton, P. Rec. Page 784; Ev. Dalner; P. Rec. Page 832).

After the equipment in both theatres had been installed, Taylor left for Seattle; but just before he left, the Juneau equipment got out of order. Taylor, being in a hurry to leave for Seattle, worked on it but did not

repair the equipment. He merely instructed Lemieux to get a new "fader" and install it if the trouble continued. The next day, when there was no engineer of appellants in sight, the trouble became worse, and Lemieux set about to locate it. He found it, and repaired it. (Ev. Lemieux, P. R. Page 806).

Shortly after that, the equipment in Ketchikan broke down entirely. There was no engineer of appellants in sight. Mr. Tuckett made the repairs, with the aid of a local Ketchikan man not connected with appellant. (Ev. Tuckett; P. Rec. Page 675-676).

There were no other serious breakdowns until sometime later when breakdowns became more frequent.

Tuckett, Lemieux, and their subordinates, not only repaired the equipment when out of order, but went over it and inspected it every day, making such adjustments as were necessary; and once a week, on Saturday, they gave the equipment a thorough overhauling. (Ev. Louis Lemieux, P. Rec. Page 803 et seq.; Ev. Ned Lemieux, P. R. Page 826 et. seq.; Ev. Tuckett, P. R. Page 674). Taylor, the installation engineer, directed the men in the employ of Gross to make these daily inspections, and his directions were followed implicitly. (Ev. Ned Lemieux, P. Rec. Page 829).

After Taylor had left, no one connected with the appellant came to Alaska until on or about October 1st,

1929, except an engineer named Albright, who called at the Ketchikan theatre on August 21st, and at the Juneau theatre on August 24th. He came to inspect the equipment and sell merchandise, but he did not service the equipment. (P. Rec. Page 390).

Under date of May 20th, 1929, appellant sent appellee Gross a letter which reads as follows:

"May 20, 1929.

Alaska Film Corp.,
Coliseum Bldg.,
Juneau, Alaska.

ATTENTION: MR. W. D. GROSS

Gentlemen:

The installation of the Western Electric Sound Propector Equipment was completed in your Coliseum Theatre, Juneau, Alaska, on May 10, 1929.

We invite your attention to Paragraph 6 of the agreement which provides that the first two weekly payments shall be due and payable on the Saturday following the completion of the installation and thereafter weekly in advance.

As a matter of courtesy, maturity notices of amounts due each week will be forwarded to you, but failure to receive such weekly notices does not in any way relieve you of the obligation to make the weekly payments as provided.

Kindly arrange to issue the necessary in-

structions to forward checks to this office.

Yours very truly,

ASSISTANT CREDIT MANAGER."

(Ev. P. R. Page 932).

Referring to this letter, Vice-President Wilcox testifies as follows: "H. N. Bessey signed that letter, which is a standard form of letter sent to all exhibitors as soon as plaintiff's Credit Department in New York receives notice that an installation is completed, in order to notify the exhibitor when the service day is." (Ev. Wilcox, P. Rec. Page 933).

No "maturity notices of amounts due each week," or other claims, demands, or statements relating to service charges were sent appellee Gross by appellant until the following September. In the meantime, under date of August 7, 1929, Appellant wrote appellee a letter urging him to buy some $800.00 worth of spare parts for each of the theatres in order to keep them protected against accidental shut-downs. The letter reads in part as follows:

> "* * * We will furnish each one of these theatres with an electric soldering iron without additional charge, to be held in the spare parts cabinets for use on our equipment.
>
> Although we carry all of these items in our Seattle stock as regular emergency replacement equipment, it would take so long to get them to Juneau and Ketchikan that the shortage of these

items might at some time cause you and your audience inconvenience, if they were not readily available.

Yours very truly,
WESTERN DIVISION MANAGER."
(P. Rec. Page 357).

Under date of September 12, 1929, appellant wrote appellee the following letter:

"September 12th, 1929.

Mr. W. D. Gross,
Care Coliseum Theatres,
Juneau, Alaska.

RE: Coliseum Theatre,
Juneau, Alaska,
Ketchikan, Alaska.

Dear Sir:

Enclosed you will find statement on the Coliseum Theatre at Juneau, Alaska, showing due the sum of $541.10 and on the Coliseum Theatre at Ketchikan, Alaska, showing due the sum of $481.-60. You will also notice that we have added to these statements ten additional weeks at the rate of $29.75, as we assume that it will take at least that time to receive your reply with remittance enclosed.

Upon receipt of this letter will you please place in the mail your remittance for $836.60 on the Juneau account and $779.10 on the Ketchikan account so that we may bring these accounts up to date without further delay.

We also suggest that you arrange to mail your remittance weekly in advance as provided in your

agreement and it would also assist us if you would write us explaining in detail the mailing time from your town to this city so that we may know just when to expect your remittance.

Your prompt attention will be appreciated.

Yours very truly,

R. HILTON,
Collection Department."
(P. R. P. 680-681).

Accompanying this letter were two statements: one for Juneau, claiming service charges at $29.75 per week from May 12 up to Sept. 14—18 weeks; and one for Ketchikan claiming service charges at $29.75 per week for something over sixteen weeks. Each statement also contains an item of $297.50, which is for an additional ten weeks which the appellee is asked to pay in advance. (P. R. Page 682-683).

Referring to the foregoing letter and statements, the witness Tuckett testifies: "I never received any statement or letter with respect to service charges before that letter." (Ev. Tuckett, P. R. Page 684). (Ev. Gross, P. R. Page 320).

The appellant did not offer any evidence tending to show that it had made any claim for service charges prior to this letter of September 12, unless it be contended that the letter of May 12 above set forth amounts to such claim; but Mr. Wilcox testified that this was merely a standard letter sent out by the Credit Depart-

ment in such cases upon receiving notice that an installation had been completed, and it merely called attention to paragraph Six, which, in the case of appellee's contract, did not provide for the p a y m e n t of any amount.

The appellee went East in the fall of 1929 before the letter and statements of September 12, relating to service charges, had reached Juneau. After the appellee had left for the East, his manager at Juneau also received from appellant proposed contracts, Exhibits 2 and 4, which are later set forth at length. Manager Tuckett wired appellee in regard to the claim for service charges, and sent the proposed contracts forward to him by mail; but the letter containing them did not reach appellee and it was eventually returned to Juneau. (P. R. Page 320).

Appellee Gross tells what happened in the following language: "I left Juneau some time in September, 1929, and hadn't heard anything about service charges or received any bill for service charges before I left; the first time I heard anything about a claim for service charges was Tuckett wired me in the East some time in October, 1929; I then left for Chicago because I figured to see Wilcox on account of his statement to me and Lemieux that I don't have service, but I didn't see him; I talked to some man, I don't know who he was, about service, and learned from him to go to Seattle and to take up the matter with Gage; I went to New York but

I didn't go see plaintiff; I returned by way of Los Angeles to Seattle and arrived in Seattle some time in December, 1929; I never saw plaintiff's exhibits 2 and 4 until I reached Seattle; I saw it in Gage's office; I had not received the mail Tuckett had forwarded me; I had been traveling about too much; I called to see Gage right away in regard to these service charges. (P. R. P. 320).

Whereupon the following proceedings took place:

Q. When you came into Mr. Gage's office, and after you met him and talked to him, knew him,—what, if anything, did you say with reference to service?

A. I asked him "What is the idea of charging me for service when I never signed up for service." He claimed he can't help himself, plaintiff is writing him right along and he has to write me at same time; we talked quite a little; I can't remmeber exactly all that he said; he has to get the money or they are going to pull out all the machines; Gage said he received a letter from plaintiff they wanted me to sign it to make it a part of the contract and he gave me those letters, plaintiff's exhibits Nos. 2 and 4, to sign; if I don't sign he threatened to take the machines out, same thing as if a person has a telephone and doesn't pay for the telephone, the telephone system would disconnect him; he spoke about paying back service charges; I told him I didn't owe service charge, didn't see why I should pay a service charge from the day I got the machines, and he said that is what the company wants, and he would take the

machines out if I didn't pay; if I don't pay the money he would notify his attorney to pull out both machines at Juneau and Ketchikan and if I didn't sign the contracts; I then signed the contracts and paid him the money.

Whereupon the following proceedings were had:

Q. At that time, Mr. Gross, what was the condition of your business, in Juneau and Ketchikan? How would your business in Juneau and Ketchikan be affected by taking out those machines?

A. I would say they would destroy the business if they took out those machines.

Q. In both places?

A. Yes.

Q. Did you know what your rights were under the contract at that time—whether he had a right to take them out or not?

A. I presume I did—I understood that they could do that.

Q. You understood he could take them out?

A. Yes.

Q. Did Gage tell you anything about that?

A. Yes.

Q. What was it?

A. He said if I didn't pay the money and sign the contract he would tear the machines out.

Q. Did he tell you anything about his power to do it?

A. He said he had power to do it.

Q. Did you know whether he had power to do it?

A. Yes I did, he did have power to do it.

Q. You believed he had power?

A. I believed he did.

Q. Did you know anything about the law?

A. Not at that time, I don't know much about the law.

Q. Did you believe he had the power to do it?

A. Yes sir.

Whereupon defendant Gross further testifies: "I owed plaintiff for five months that we hadn't paid yet but I didn't owe him anything that was due at that time; I had done everything the contract called for; there was still five months unpaid but the payments had been kept up right along; I didn't owe them anything on the Juneau contract of March 28, 1929, nor the Ketchikan contract of March 28, 1929, but had paid everything due under them to that time; I performed everything required of me under those contracts; when I signed the application for those contracts I paid $1,130.00 on deposit; these payments that fell due were made in twelve payable notes that are described in the contract and at that time I had paid seven of them and interest also; I believed Gage had the power and would take the machines out."

Q. Was there anything that led you to sign those contracts except the threats of Mr. Gage—in

other words, would you have signed the contracts except for the threats of Mr. Gage?

A. No.

Thereupon Witness Gross further testifies: "I never saw Anderson, the man whose deposition has been read in this case; I can't recollect whether I ever wrote him or not; Gage never told me who Anderson was; after the contracts had been signed by me and the money paid to Gage, the latter told me he was going to try to persuade the company to put a man in Juneau and one in Ketchikan to take care of my service but they never did." (Ev. Gross, Pr. R. P. 321 et seq.).

No other talking machines were available in December, 1929, when I signed plaintiff's Exhibits 2 and 4. (Pr. R. P. 325).

The witness Cawthorne, who was the representative of Gross at Seattle at that time, and who accompanied him on the occasion of his visit to the office of Gage, relates what happened in the following language:

A. Well, as soon as we came into the office, Mr. Gage was sitting there and he greeted Mr. Gross and I, and Mr. Gross wanted to know what all this rumpus about service charges was, said he had received a wire from his manager in Ketchikan stating the Western Electric was trying to collect some kind of service charge and wanted to know what it was all about. Mr. Gage stated the company was now in a position to render service up

there and they was demanding him that he pay service charges. Mr. Gross argued he had no service charges and was trying to verify the fact by Mr. Gage. The argument was quite lengthy and quite heated, they got pretty warm on both sides for quite a while. Finally, Mr. Gage said that he had no alternative that the company wanted these services and he was only working for the company and he had to obey or do as they told him, so he said, "There is no out, you have got to pay these service charges and sign" an agreement of some kind.

Q. Did he bring out the agreements?

A. And with that he pushed a couple of sheets or a couple of documents across the table and told Dave that he had to sign those papers and pay the money right then or he would not accept any more money either on the contract or anything unless the services were paid and those papers signed. Mr. Gross and I we started—

Q. Did he say anything further about the equipment?

A. Well, yes, he did. We started arguing among ourselves. He turned around and says, "There is no use in arguing, this thing. If you don't sign those papers, pay this money, Dave, they will come up there and tear your equipment out just like the telephone man tears the phone off the wall if the telephone isn't paid for.

Q. Did he say "he" or "they" would do it?

A. I wouldn't say whether "he" or "they"—

that the Western Electric Company would do it.

Q. Then what happened?

A. Mr. Gross and I went into conference, and he brought out the fact Mr. Gross didn't have all of his original—that is all of the payments on his original purchase or contract made, and that if he didn't or wouldn't accept any more money on it he was afraid they could and would take the machines away from him.

MR. ROBERTSON: I move to strike as a conclusion, that "he was afraid they would take them out" as not proper testimony.

THE COURT: Motion sustained.

A. Mr. Gage was sitting right across the table from him.

THE COURT: Was he present?

A. Yes, he was.

THE COURT: Very well.

A. So he decided then that, or we, Gross and I, decided Mr. Gage did have the authority and would take the machines away from him, so with that he paid the money demanded, some nine hundred and some odd dollars and signed the documents.

Q. Both papers?

A. Both papers.

Q. What, if anything further, did Mr. Gage say at that time with relation to service?

A. He got friendly with Mr. Gross again then and congratulated Mr. Gross on his good

> judgment; and said that was the best thing he ever done and he said, "Now you are going to get service at Ketchikan and Juneau," and he said that he would establish an office in Juneau with a service man in both Ketchikan and Juneau.
>
> (Ev. Cawthorne, P. Rec. Page 477 et seq.).

Appellant's witness Gage testified upon this point as follows: "We conversed and Gross again asked that I take up with my home office the matter of having his own men service the equipment; I told him this had been done and the decision was final, that they refused to permit anyone outside of their own engineers to service the equipment; I didn't threaten him at all; I told him frankly that he must live up to the terms of his agreement or return the equipment; I said: 'If you don't want to carry out your agreement, all right.' I used such illustrations as 'if you do not pay your telephone bill, your telephone will be disconnected.' I pointed out to him that in accordance with his contract he was already in default and that it was only our leniency that kept him going as long as he did; without undue persuasion he signed the agreement and paid for thirty-two weeks' back service charges, together with some small accounts, bill of approximately $15.00; we discussed the question of payments and I told him that if he was to continue the use of the equipment he would have to perform all the provisions of the contract, including the payments of weekly service charges." (P. Rec. Page 928).

The undisputed evidence is that at this time the appellee had a large and profitable business at both the Juneau and Ketchikan theatres, which would be interrupted if the equipment were taken out.

The appellee Gross did not know at the time what effect the threats that Gage had made had upon the legality of the supplemental contracts. He did not know this until he consulted an attorney sometime later. (Ev. Gross, P. Rec. Page 356).

One of the supplemental contracts signed by appellee on the occasion above referred to was received in evidence and marked plaintiff's Ex. 2. It is written upon letter paper and the letter head of appellant and the exhibit reads as follows:

"ELECTRICAL RESEARCH PRODUCTS INC.
Acoustic Department
250 West 57th Street, New York, N. Y.
Subsidiary of
Western Electric Company
Incorporated

September 4, 1929.

Mr. W. D. Gross,
Coliseum Theatre,
Juneau, Alaska.

Dear Sir:

Referring to our agreement with you dated March 28, 1929, for the installation and use of

Western Electric Sound Equipment in the Coliseum Theatre at Juneau, Alaska—

This agreement was executed with the provision left blank relating to weekly service payments, in order that the amount thereof might be later determined.

It is proposed that this provision of the agreement be now made definite, and that in order to give effect thereto, the above mentioned agreement be modified by striking out paragraph 6 thereof (which, as above stated, was left blank as to the amount of the charge) and inserting in lieu thereof the following:

6. In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term shall be payable on the Saturday next succeeding the "Service Day" and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such Payment shall be in accordance with Products' regular schedule of such charges for theatres in Alaska as from time to time established. Under Products' present schedule, the service and inspection payment shall be $29.75 per week, which charge shall not be exceeded, provided, however, that the Exhibitor agrees to reimburse Products for any extra expense incurred by Products because of the use of airplane or other extraordinary means

of transportation incurred in connection with emergency service visits.

Will you kindly indicate your acceptance of the above by signing and returning to us one copy of this letter.

Very truly yours,

(Signed) R. E. ANDERSON,
Comptroller.

Accepted: W. D. Gross,
Exhibitor's signature witnessed by:
J. A. GAGE."

(P. R. P. 27 et seq.).

The other supplemental contract signed at the same time under the same circumstances was received in evidence as plaintiff's Ex. 4. It is exactly like exhibit 2 except that it relates to the Ketchikan theatre, while exhibit 2 relates to the Juneau theatre.

There is some other evidence, scattered through the Record, relating to duress. The question of whether the threats and conduct of Gage amounted to duress under the circumstances testified to by the witnesses, was submitted to the jury under appropriate instructions, and the issue was found against the appellant. No error is assigned in connection with the giving of these instructions.

Appellant does not claim to have sent a service man to Alaska between the times that the supplemental contracts were signed, in December 1929, and the 24th

day of February, 1930; although there is some evidence that a man named Smith, for whose visit appellant claims no credit, passed through Ketchikan and Juneau on his way to Western Alaska, in the meantime.

During January, 1930, there was a short circuit in the Juneau equipment which made it impossible to use the disc. Gross had, immediately after signing the supplemental contracts, wired Tuckett that he had "signed for service." Tuckett wired appellant's Seattle office as follows:

JUNEAU, ALASKA, JAN. 17, 1930.

COLLECT BLACK
ELECTRICAL RESEARCH PRODUCTS
458 SKINNER BLDG SEATTLE

WE HAVE A SHORT IN OUR EQUIPMENT WHEN WE THROW LEVER FROM FILM TO DISC WE BLOW OUT FUSE IN BATTERY ROOM CAN'T USE DISC FILM SIDE OKAY ADVISE HOW TO FIND TROUBLE MUST KNOW AS IT IS IMPOSSIBLE TO GET SERVICE MAN HERE IN TIME

COLISEUM THEATRE"

R. P. 677).

On the same day the Seattle office answered, giving some instructions as to how to find the trouble, and advising that a service man named Smith was on the steamer Northwestern going North.

Two days later on the 19th, Smith wired to meet him when ship arrived on following Monday. (Pr. R. P. 677-678).

Before receiving either of these telegrams, however, Ned Lemieux, an operator under Tuckett, had the good fortune of locating the trouble, so as to be able to repair it and keep the theatre running. (Pr. R. P. 678).

On her way North, the Northwestern, carrying Smith, stopped in Ketchikan 16 hours. Smith came ashore in an intoxicated condition, went through the theatre at high speed, inquired for a bootlegger, and disappeared. (Ev. Louis Lemieux, Pr. Rec. Page 809.)

Eventually, the Northwestern reached Juneau. Ned Lemieux went to meet Smith at the appointed place, but Smith did not make his appearance until just before the steamer left. Upon learning that the equipment had been repaired, he told Lemieux that he was on his way to the Westward to install equipment for Capt. Lathrop in a string of theatres and that he had the equipment with him on the ship. He then asked Lemieux to sign a blank service report, which he said he would fill in later. Smith told Lemieux that it was the intention to keep a stock of spare parts at Juneau and have a service man stationed there all the time, and that he would provide for all this on his way south. But he never did. (Ev. Ned Lemieux, Pr. Rec. Page 824-825.)

About two or three weeks later, the Juneau theatre had a loose connection in the equipment. They wired advising appellant that they had a loose connection and asking when service man would arrive, and also inquired why spare parts ordered had not been sent. All appellant did to meet the situation is indicated in certain telegrams testified to by appellant's witness Briggs. The Los Angeles office wired Briggs under date of Feb. 4, 1930, as follows:

"FEB. 4, 1930

J. S. BRIGGS, ERPI

458 SKINNER BLDG., SEATTLE, WASH.

COLISEUM JUNEAU WIRED US AS FOLLOWS QUOTE WHAT IS THE MATTER WE CANNOT GET REPLACEMENTS ON TWO THREE NINE TUBE WE HAVE FOUR COMING NONE ARRIVED YET AT PRESENT WE HAVE NO SPARE ON THIS TUBE MUST HAVE SPARES WE HAVE A LOOSE CONNECTION IN SYSTEM SOMEWHERES WHEN WILL SERVICE MAN ARRIVE UNQUOTE WIRE THEATRE STATUS IMMEDIATELY AND IF NECESSARY RUSH EXTRA TUBE STOP ADVISE

P. M. WALKER."

(Pr. R. P. 914).

Upon receipt of this wire, Briggs wired Smith, who was now in Cordova, Alaska installing equipment, as follows:

"FEB. 4, 1930.

SEATTLE WASH.

E. V. SMITH, ERPI ENGR.

EMPRESS THEATRE

CORDOVA ALASKA

COLISEUM THEATRE JUNEAU ADVISE HAVE LOOSE CONNECTION IN SYSTEM STOP ALSO THEY HAVE ORDERED FOUR TWO THIRTY NINE AYE TUBES STOP ESS DEE ORDER HAS NOT BEEN RECEIVED BUT WE ARE FORWARDING FOUR TUBES ON BOAT LEAVING FIFTH STOP MAKE SURE WE RECEIVE ESS DEE ORDER STOP ACCORDING TO LOS ANGELES YOU WILL SERVICE ALL ALASKAN HOUSES FROM NOW ON

J. S. BRIGGS. "

NIGHT LETTER.

(Pr. R. P. 915).

Whereupon Smith wired Briggs as follows:

"CORDOVA ALS FEB 5, 1930

J. S. BRIGGS

ERPI FOUR FIFTY EIGHT SKINNER BLDG., SEATTLE

RETEL WILL BE IMPOSSIBLE TO SERVICE JUNEAU OR KETCHIKAN UNTIL INSTALLATIONS ARE COMPLETED AT ANCHORAGE AND FAIRBANKS WHICH WILL BE AT LEAST SIX WEEKS YET REGARDS

E. V. SMITH."

(Pr. R. P. 916).

There upon Briggs wired Juneau theatre as follows:

"SEATTLE WASH.
FEB. 5, 1930.

COLISEUM THEATRE
JUNEAU ALASKA
TUBES SHIPPED TODAY ENGINEER ARRIVES TWELFTH ADVISE NATURE LOOSE CONNECTION

J. S. BRIGGS
STRAIGHT WIRE"
(Pr. R. P. 917).

A few days later Briggs received a letter from Juneau advising that the equipment had been repaired. Briggs, concluding that no service man was then required, did not send one until February 22. (Ev. Briggs. Pr. Rec. Page 918).

Appellee Gross returned to Juneau on February 10, and on that same day he wrote a letter to Gage, appellant's agent, which reads as follows:

"Feb. 10, 1930.

Mr. Gage
Electrical Research Products Inc.
Seattle, Washington

I arrived in Juneau today and my manager is complaining about the service that you have been giving us up here on your Western Electric system.

I paid you while in Seattle, something like

$2000.00 for back service. I can say that I am awful sorry now that I have done this and also that I signed the contract for service as the men you have sent up here have done more harm than they have done good.

After keeping the machines for several months with my own men taking care of them. They gave us no trouble and perfect service. But after I decided on service and service was given they have been on the bum and in fact are still on the bum.

It seems to me that I have men operating in the booth who seem to know more about your equipment than your so called service men or rather electrical engineers. And still we have no right to look over our equipment. You send a man up here just out of school and who don't know what it is all about.

For the last two months we have had one man up here and he gave about 30 minutes service to the machines and put it on the bum because since that time everything has happened.

To date we have plenty of trouble on our movietone and also your tubes do not hold up to standard. They must be old tubes or damaged ones. I don't know which.

Everything from the first that has had to be fixed on this equipment has been done by my men. And most of the time without any help from your office. There is not one thing that has happened to these machines that we have not had to fix ourselves as your service men were too late or they did not come at all in fact we can name

one thing that your service man, one of them could not fix and my man fixed it.

Also we have been promised and they have been recommended new lenses for the movietone. But to date we have failed to receive them or in fact hear anything about them. And more than two months ago we ordered felt pads and they have just arrived.

I want to discontinue my service as since I paid you $2000, your service has been very unsatisfactory and for a matter of fact before this time. In fact my own men are better able to do this service than what your engineers can. As my men have to fix things when they go wrong right then as the show must go on no matter what happens.

When I saw you on the wharf you had a man coming up here. But it seems that he just looked at a few things and left at once for Lathrop's towns. He spent about enough time to write out a report and that is all. Thirty minutes would be a long time for him here.

I think I am entitled to an adjustment on this $2000.00 and also on the last remittance that was made from Juneau as it is just a waste of time for them to come up here to spend 20 or 30 minutes and then go and then my men have to fix things.

I would like a answer to this letter by return mail as I am not at all satisfied with your service.

Very truly yours,
W. D. GROSS."

WDG-c.
(Pr. Rec. Page 329 et seq.).

Under date of Feb. 17, 1930, Gross wrote another letter to Gage which reads as follows:

"Juneau, Alaska,
Feb. 17, 1930.

Mr. Gage

Electrical Research Products Inc.

Seattle, Wash.

Dear Mr. Gage:

I received a wire from your office to the effect that your engineer would arrive Juneau, on the twelfth of the month to repair our equipment that we were having trouble with. To date your engineer has failed to arrive and according to the boat schedules he will not be able to arrive until about the twenty-fifth. This is twelve days after you notified me that he would be here.

This delay in your man arriving has made it so that I had to have my own man repair your equipment.

My idea Mr. Gage, is that there is no way that we can have service in Alaska that would be satisfactory unless you have a man in each town that you have equipment. As it is now the boats are so far between in the winter time, that it is over fifteen days before we could even get service here. And it always happens that when we need service there is no boat or your man is somewheres else. This winter everything that has happened we have had to fix. In fact not one of your men have fixed a thing that has gone wrong. All they have done is to look over the equipment and let it go at that. I would rather take chances and if my men could not fix things, I would wire you

for a man and would pay his fare, expense and salary to Juneau and back.

The $2000.00 I paid you while I was in Seattle, I am now sorry that I did this. RCA has no service man. All the exhibitors that have one of these equipments have to do is to pay off for the machine.

I do not see why I should have to have a service men and get no service as I can assure you that all the real servicing that has been done has been done by my own men.

You had better notify your New York office as to my intention on this service charge.

Also if you think that you can put a service man in Juneau, and have him service Fairbanks. I can assure you that this cannot be done, as the boats and trains in this country do not run as the trains do outside. It will take sometimes a couple of months to make this trip and sometimes longer than this as you can never tell when a boat is going on the rocks, which they do.

From now on I am going to ignore your service charges unless you have a man in Juneau and one in Ketchikan, and if you do not do this. Then I will call for one from Seattle, when I need one and will pay his fare salary and expenses from Seattle.

I am enclosing a bill. And you may make a copy of same and send it to New York.

I have regretted signing that letter the minute after I signed it as your service here in my

theatre has been most unsatisfactory, in fact I have received no service when I really needed it. No court will uphold this agreement when the service has been as it has in the past.

My manager notified you on Feb. 3, 1930, that one of the machines were in need of service. Here it is the 18th and no man has arrived yet. This is not service I can assure you.

I am awaiting a reply to this letter before I take this matter further as I am very dissatisfied the way things are and have been going in regards to service.

Very truly yours,
(Signed) W. D. GROSS."

WDG-c.
(Pr. Rec. P. 332 et seq.).

Under date of March 28, 1930, appellee wrote appellant as follows:

"Seattle, Washington
March 28, 1930.

Mr. R. H. Pearsall,
Electrical Research Products,
San Francisco, California.

Gentlemen:

Your wire of March 14th was relayed to Seattle, as you know I have been traveling for several weeks through small towns.

Will state that the service charge, as it now stands, is out for Alaska. Unless we have a man right in the town where the machines are, it is absolutely no use to make any attempt to pay service charges for Western Electric Equipment.

My men wired you at one time that their machine had broken down and to send a repair man. You answered, stating that a man would be sent on the first boat leaving Seattle, but he did not show up for several weeks, and we were without service during that time. We had to run one machine as the first one was out of "whack" and I cannot see where your service is of any use to us or where it does us any good.

My first agreement with the company was to pay for service charges as I needed them, and for any service needed, I was to pay a man a salary and for his ticket up and down.

A man stationed in Juneau could take care of Juneau and Ketchikan. That would be quite a chance as the boats do not run very often, about once a week or every ten days. In case the machine in Ketchikan broke down, we would have to wait a week or ten days for a man to come from Juneau, but that would be more help than the present line up for service.

You just received $2,000.00 for service for two men to come up and then go right out again on the next boat.

Hoping you can see that I am trying to get away from the present service, and if this thing doesn't come to settlement, I will have to make a settlement on this service charge, which would be the best way to handle it.

You could write me at Seattle, c-o Atwood Hotel. I am going to take this matter up with Mr. Gage, your representative. I wrote him a letter, telling him all about the situation, and I don't

know whether he referred the letter to you or not.

Yours very truly,
(Signed) W. D. Gross.

WDG:h"
(Pr. Rec. Page 336. et seq.).

Under date of June 11, 1930, appellant wrote appellee as follows:

ELECTRICAL RESEARCH PRODUCTS, INC.
Subsidiary of
WESTERN ELECTRIC COMPANY
Incorporated
New York City, N. Y.
Western Division Headquarters,
7046 Hollywood Boulevard
Los Angeles, California,

June 11, 1930.

Mr. W. D. Gross,
Ketchikan, Alaska.

Dear Mr. Gross:

We have for some time considered arrangements for servicing your theatres at Juneau and Ketchikan, that might better assure you of uninterrupted performances.

We realize that under the present arrangements a serious breakdown in the equipment might mean the loss of several consecutive shows before our engineer could arrive at the scene.

As a means of overcoming this hazard, we are contemplating the employment of a man in each of the towns in Alaska where our equipment

is located, to render emergency service. We plan to secure men with the proper technical background, train them in the maintenance of the sound installation, and furnish them with tools, technical data and other equipment necessary to insure their ability to keep the installation operating properly.

In addition to this service, we intend to send a Technical Inspector to Alaska at intervals of approximately six months with the dual purpose of thoroughly overhauling the sound equipment and to instruct the local service men in the latest developments in sound reproduction. The proposed arrangements would in no way effect the weekly service charge that you are now paying. Any additional expense involved will be absorbed by this Company.

As we would like very much to see these arrangements in effect before the end of the summer, we shall appreciate your early acknowledgement of agreement to the proposals set forth in the foregoing. With best wishes for continued success, I am,

Very truly yours,

(Signed) N. A. ROBINSON
Service and Technical Inspection
Superintendent."

NAR: ID

(Pr. Rec. Page 338 et seq.).

"Appellant never placed a man in Juneau or Ketchikan as indicated in that letter, nor did anything indicated in that letter, nor took any steps toward it." (Ev. Gross Pr. Rec. Page 339).

All appellant claims to have done was to send a service-man to Alaska about once a month. With the exception of one man who came to Juneau to install equipment in an opposition theatre, which kept him there for several days, all these men stopped at Juneau and Ketchikan only while the steamer was in port enroute to Western and Interior Alaska. All this appears from the testimony of the various service-men and reports which were received in evidence as exhibits. (See also Louis Lemieux; Pr. Rec. Page 802.) Referring to the service-men and their stay in Juneau, the witness Ned Lemieux says: "I don't remember any of the service-men by name; they weren't around here long enough for me to get that familiar with them." (Pr. Rec. Page 823).

In Sept. 1930, appellant sent a service-man named Lawrence, to Alaska. He remained in Alaska all the time, but not in Juneau or Ketchikan. He inspected theatres not only in Southeastern but also in Western and Interior Alaska. He started from Juneau and went direct to Fairbanks. In doing this he crossed the Gulf of Alaska and other intervening waters to Seward, the terminus of the Alaska Railroad. This meant a sea voyage of about three days. Then he took the Alaska Railroad to Fairbanks, which took two days. There was only one train a week from Seward to Fairbanks—in summer during the tourist season there was a gas train as far as McKinley Park from where a freight train could be taken to Fairbanks. He was

obliged to remain in Fairbanks a week, because the train did not go back for a week. From Fairbanks he went to Anchorage, where he was obliged to remain a week waiting for the next train. Then he went to Seward by rail in five hours if the railroad was in repair. The railroad is in good repair except, to use the language of the witness, "barring a few cases where the engine slips off the track or something it is always in good shape." From Seward he went to Cordova, which took him about a day. Here he remained a week, waiting for a boat. From Cordova, he went to Ketchikan, touching at Juneau. It took a fast steamer about 32 hours to Juneau, and about another day to Ketchikan. Then from Ketchikan he would return to Juneau to start over again. (Ev. Lawrence, Pr. Rec. Page 263 et seq.). These periodical trips were made by Lawrence from month to month just as described, as nearly as the schedule of the boats and trains would permit. (Ev. Lawrence Pr. Rec. Page 289).

This witness testified that he was a service engineer under witness Briggs, who had charge of appellant's service at Seattle. Referring to the character of service furnished at Seattle he says: "The operator there had your telephone number. When the trouble occurred, all they had to do was to telephone you." (Ev. Lawrence, Pr. Rec. Page 262).

And upon the same subject, he testifies on page 262 of the Record, as follows: "The theatre had my

telephone number so if they had trouble I could go fix it; I was always on call." (Pr. R. P. 262).

On page 261 of the printed Record this same witness testifies: "The various component parts of the talkie equipment, if not handled carefully, are apt to get out of adjustment. A number of these parts are liable to get out of adjustment or repair at any moment."

On page 220 et seq. of the printed Record, the witness Lawrence tells what an inspection of equipment consists of; and on page 261 of the Record he says: "I didn't ever make an inspection of the equipment, either in defendant's Juneau or Ketchikan theatres of such scope as embraced in the entire inspection examination that I described."

And in enumerating the various things that require inspection, he says on page 251 of the Record: "and the ground is periodically checked to determine whether it is tight and making good contact, and whether sufficient non-oxide grease is present to overcome corrosion, as defects in the ground would introduce hums, popping or frying noises and a defective ground might cause entire loss of sound." And on page 286 of the Record this same witness testifies: "I don't know where the ground in the defendant's Juneau theatre is located."

During the time that the equipment was in the thea-

tres there were occasional breakdowns both at Juneau and at Ketchikan, but no service-man in the employ of appellant was ever present at either place when a breakdown occurred, nor did any service-man of appellants ever do anything in the way of repairing the equipment. (Ev. Tuckett, Pr. Rec. Page 675; also Ev. Ned Lemieux, (Pr. R. Page 823 et seq.); also Ev. Louis Lemieux (Pr. Rec. P. 804 et seq). Approximately once a month, they made an inspection of the equipment that did not differ from the inspection the employees of Gross made every day. And because they came during the day, before the regular daily inspection had been made, they made such minor adjustments as the employees of Gross made from day to day. Upon these matters the witness Tuckett testifies: "I inspected the machinery every night, made minor adjustments generally, same as the engineer does, checked the line voltage, back stage to the horns, each tube and different panels, exciter lights after the machine warmed up, the sound too if both horns were on while the machine was running; once a week go over the machines thoroughly to see they were oiled; every night two or three times during the show, checked the sound to see if it had the right fader setting; whether good, bad or any trouble; pretty near every night we readjusted the photo electric cell; if a tube was weak, we put in a tube from the spare parts cabinet; on weekly inspections saw they had plenty of oil, machines cleaned up, no dirt in the lense; whether exciter light wasn't

too dark or was performing as it should, seeing machine was all cleaned; every week we would go over the whole machine and, where there was any grease, wash it off with tetrachloride and any other dirt, clean it off; the service-man who came up here and made inspections did nothing more than I did every day and every week; they sometimes made the same adjustments I made, because I never made adjustments until an hour or so before the show started at night; we would run it four or five hours the night and after the show you don't want to make adjustments, so we left it until the next day; the engineer usually came in the day time, morning or afternoon, consequently any adjustments necessary were caused through the last night's run; no engineer ever repaired the equipment, or was ever present when there was real trouble or anything wrong; we had breakdowns or difficulties with the equipment." (Ev. Tuckett, Pr. Rec. P. 674 et seq.) (See also Ev. Louis Lemieux, Pr. Rec. P. 803 et seq.); also (Ev. Ned Lemieux, Pr. Rec. P. 826 et seq.).

The only service-man who ever did anything to the equipment, other than to make such minor adjustments as were made by Gross's men from day to day, came in the spring of 1930. He didn't make any repairs, but he did something. He shortened up a wire that should have been left as it was, and then failed to solder the ends together properly. One night after he had left and when there was no service-man in sight,

"a noise came into the horn that was so bad that you couldn't hear the talking at all." Fortunately, Ned Lemieux, who was working for Gross, was able to locate the trouble. He got a new wire and re-soldered it, and the show went on. (Ev. Ned Lemieux, Pr. Rec. Page 825-826).

Appellant's service-men did not make these occassional visits for the sole purpose of inspecting the equipment, "they came to inspect the equipment and to sell merchandise." (See Ev. Gross, Pr. Rec. P. 376).

On Page 288 of the Record appellant's serviceman Lawrence put it this way: "I made those inspections with the view of preventing breakdowns; my work amounted to more than that, though; periodically we received engineering information from our Engineering Department of new discoveries and improvements and we put those into effect in the equipments in the theatres we were servicing, having a regular service of information of that sort forwarded to us and it was our duty to see that those new devices were installed in those theatres if we could sell the defendant on the idea."

There was never a lack of diligence on the part of appellant when it came to collecting service charges. The methods employed by Gage in collecting the first $1,976.60 in Dec. 1929, were continued throughout. The threats then made by Gage were such that they

continued to hang over Gross. On Page 928 of the Record, Gage testifies: "We discussed the question of payments and I told him that if he was to continue the use of the equipment he would have to perform all the provisions of the contract, including the payment of the weekly service charges." And on page 929 of the Record, he says: "We also discussed the fact that if he wished to continue the use of the equipment, it would be necessary for him to continue his payments as he had agreed, including the payment of weekly service charges."

After the supplementary contracts had been signed in Dec. 1929, appellant not only sent weekly statements, but as early as Jan. 1930, it commenced wiring for service charges. On Feb. 3, 1930 Tuckett wired that the money had been sent. The amount of service charges paid at that time was $119.00 for each house, or $238.00 in all. (See Ev. Tuckett, Pr. Rec. Page 687 et seq.). This was the period during which the Juneau theatre had one breakdown, and one short circuit, the repairs in both instances being made by employees of Gross, there being no service man available. During this period, Smith, who was on his way to Western Alaska, came up town while the ship was in port and discharged whatever duty appellant owed in the way of rendering service, by inquiring for a bootlegger.

A few days later Gross returned to Juneau, and

wrote the letters previously set forth at length in this statement, indicating that he would pay no more service charges. None were paid until the following April. On March 14, appellant wired it could not permit continued use of equipment unless service charges were paid. (Printed Rec. Page 452). During April, Gross was in Seattle, and Gage phoned for him. When he got there, Gage told him among other things, "When a chicken don't lay eggs, you know what happens to her, they cut her head off and that is what we are going to do to you if you don't pay up." (Ev. Gross, Pr. Rec. P. 325). Gross then paid an additional $476.00 for service charges. (Ev. Pearsall, Pr. Rec. P. 301).

Thereafter, as before, the bills for weekly service charges were supplemented by a flood of telegrams demanding payment. The Record is full of such telegrams.

One of these telegrams, dated May 28, 1930, contains the statement the appellant cannot permit continued use of equipment unless service charges are paid. (Pr. Rec. P. 456).

On June 6th, appellant wired that unless account were paid it would be forced to refer it to the legal department. (Pr. Rec. P. 456).

On Sept. 22, 1930, appellant again wired that unless payment made in full by October 3rd., account

would be referred to legal department. (Pr. Rec. P. 459).

On October 23rd, 1930, appellant's attorney wrote as follows:

MOTT, VALLEE, AND GRANT
Suite 1215 Citizens' National Bank Bldg.,
Los Angeles
Cal.

October 23, 1930.

Mr. W. D. Gross,

c-o Coliseum Theatre,
Juneau, Alaska.

Dear Sir:

Our client, Electrical Research Products, Inc., has placed in our hands for immediate action the matter of your delinquency under license agreement of March 28, 1929, covering the Western Electric sound equipment installed in your theatres.

The delinquency against your Coliseum Theatre at Juneau, amounts to $797.94, and that of the Coliseum Theatre at Ketchikan to $840.00 or a total of $1638.58, as of September 27, 1930.

It is imperative that this delinquency be taken care of at once, or some suitable arrangement for its payment made with us; otherwise, we are instructed to take immediate steps to disconnect your equipment and collect the indebtedness.

Kindly communicate with us at once.

Yours very truly,

(Signed) K. E. GRANT,

for

MOTT, VALLEE & GRANT.

KEG:H

(Pencil notation:—Soon as Mr. Gross arrives we will forward a check to the company 500.00 the full amount will be remitted as soon as we can take care of it as biz. bad.)"

(Printed Rec. Page 691 et seq.).

Upon receipt of this letter, Gross and Tuckett talked things over. Unless something was done, the equipment would be disconnected. They concluded to stall off the appellant until Gross could go to the States and see the appellant's officers and make some kind of a settlement with relation to those service charges. In order to save the equipment, they sent a check for $500.00 ($476.00 of this later credited to service charges) and wrote a letter complaining of bad business—all just to stall the appellant off until Gross could get away. (Printed Rec. P. 693 et seq.).

This was in the fall of 1930; and in the early spring of 1931, before Gross could arrange his affairs so as to get away from Alaska, the account was sent to Attorney Robertson of Juneau for collection. Manager Tuckett tried to stall off Robertson so as to enable Gross to get to the States and make an attempt to

get some kind of a settlement. (See Ev. Tuckett Printed Rec. P. 695.)

Robertson, however, took the position that the account was due and insisted on payment. He brought an action to recover the service charges and attached the box offices at Juneau and Ketchikan. Thereupon, Gross put up a bond to release the attachment. (See Ev. Tuckett, Pr. Rec. P. 695; also Ev. Gross, Pr. Rec. P. 348).

Thereupon Gross received a letter from Attorney Robertson, which reads as follows: "Exhibit F-10.

March 26, 1931.

R. E. Robertson,
Attorney at Law,
200 Seward Bldg.,
Juneau, Alaska.

Mr. W. D. Gross,
Juneau, Alaska.

Dear Sir:

On account of your failure to comply with the terms of that certain written contract entered into on March 28, 1929, between you and the Electrical Research Products, Inc., and subsequently mutually modified on or about September 4, 1929, in respect to that company's granting you a non-exclusive, non-assignable license to use in your theatre at Juneau Alaska, certain equipment more particularly designated as "Type 2-S equipment designed for use with two simplex projectors for

film and disc reproduction for the electrical reprouction of sound in synchronization with, or as incidental to, the exhibition of motion pictures, or any performance given in conjunction therewith, and of your failure to perform the terms of a similar agreement, similarly modified, covering similar equipment in your theatre in Ketchikan, Alaska, and in view of your default in performing the terms of these agreements both in respect to your Juneau and Ketchikan theatres, on behalf of the Electrical Research Products, Inc., I hereby make demand upon you for the immediate return to it of the aforesaid equipment at each of said theatres.

Unless you notify me on or before Tuesday, March 31, 1931, that you will immediately return the above described equipment which is now in each of your Coliseum Theatres in Juneau and Ketchikan, action will be promptly instituted against you by the Electrical Research Products, Inc., to recover from you the possession of this equipment now in your Juneau theatre and of this equipment now in your Ketchikan theatre, together with damages for the detention thereof.

Yours very truly,

(Signed) R. E. ROBERTSON."

RER:H.

(Pr. Rec. P. 349).

Referring to the events that took place immediately following the receipt of this letter, the witness Gross testifies: "After receiving that letter I saw Robertson and told him that the bond was put up, why didn't they wait and see if the Court says I have

to pay service charges or not; he claims he is the Court and will take this into his own hands and he said if I don't pay the money right off he would tear the machines out; that is all the conversation I know; I went to my office and talked to my manager and he told me he would go to see Robertson and see what he could do, and he came back and he advised me to take the first boat and go outside and buy other machines; the boat was in port, I took the boat, left for Seattle, wired Universal High Power to have two machines ready, one for Juneau and one for Ketchikan." (Pr. Rec. P. 350-351). The witness further testifies that he procured these new machines to prevent a shut-down, and that in case the equipment then in his theatres was replevined he would have to close his theatres. (Pr. Rec. P. 351. See also Ev. Tuckett, Pr. Rec. P. 695 et seq.).

The total cost of the new equipment purchased in Seattle at this time, including additional parts, was $5,257.84. (Pr. Rec. P. 699).

While Gross was gone to Seattle, Tuckett managed to stall off proceedings; but immediately upon the return of Gross this replevin action was brought. Pr. Rec. P. 697).

When the writ of replevin was served appellee asked for time to put up a bond in an equivalent amount; but counsel for appellant refused to grant it and di-

rected the marshal to take the equipment out. (Ev. Tuckett, Pr. Rec. P. 697).

The equipment was then taken out, and Lawrence, an engineer in the employ of appellant, immediately took the equipment apart so that appellee could not put it together again. This made the equipment entirely useless, so far as appellee was concerned. (Ev. Tuckett; Pr. Rec. P. 697 et seq.; also Ev. Gross Pr. Rec. P. 358-359).

Lawrence also disconnected the Ketchikan equipment, immediately upon the service of the writ, so that it could not be reassembled by appellees. (Pr. Rec. P. 834).

The new equipment brought up from Seattle by Gross was then immediately installed in both theatres. (Pr. Rec. P. 360; 834).

The new equipment proved to be inferior to the old. The sound was bad. Everything was done to improve it, but to no avail. However, this equipment was the best and only equipment to be had at that time. (Ev. Gross, Pr. Rec. P. 360-361).

This immediately resulted in a loss of business, and consequent profits. (Pr. Rec. P. 361-362). In Ketchikan the results were the same, for the same reasons. (Pr. Rec. P. 363).

Both theatres were operated by appellee for a per-

iod of something less than two years after the equipment was removed by appellant. During this period the Juneau theatre lost $32,165.96 in profits and the Ketchikan theatre lost $50,326.06 in profits. (Pr. Rec. P. 556; 560). Thereafter both theatres were leased to one Shearer, who soon afterwards re-installed appellant's equipment. (Pr. Rec. P. 556; 560).

It will be necessary to review the evidence relating to the loss of profits in connection with a discussion of that subject. In order to avoid repetition, it will not be referred to in the statement of facts except to say that it shows, among other things, that appellee's theatres were always profitable until the equipment was removed under the writ of replevin, and what these profits were from month to month during the two years next preceding the removal of the equipment. It also shows the losses from month to month after the equipment had been removed. In addition to this it shows the pick-up after appellant's equipment had been re-installed by Shearer. In the case of the Ketchikan theatre, profits were immediately restored; in the case of the Juneau theatre, losses were immediately reduced, but as Shearer used it as an overflow and second class theatre in connection with the operation of another theatre, it cannot serve as an index. (Ev. Gross, Pr. Rec. P. 471).

When Shearer took the equipment which Gross had brought up from Seattle out of the theatres, it had

no value for junk or otherwise. (Pr. Rec. P. 366).

The rental value of the equipment taken out for the unexpired term of the lease or license was admitted in the Complaint to be $1,050.00 per year for each theatre, (Pr. Rec. P. 14, 15, 8) or $2,100.00 per year for the two theatres. (See Complaint; Pr. Rec. P. 14, 15, 8).

The Complaint sets up the original contracts, Exhibits Nos. 1 and 3, and also the supplemental contracts Exhibits Nos. 2 and 4. It is claimed that unpaid service charges were due in accordance with the rate fixed in the supplemental contracts Exhibits 2 and 4. The answer admits the execution of the original contracts Exhibits Nos. 1 and 3; but it denies that the supplemental contracts Exhibits Nos. 2 and 4 are the contracts of the parties, and denies that they were executed by appellant, and avers that they are without consideration and that the signatures of Gross thereto was obtained by duress. The answer also contains several Counter-Claims. These Counter-Claims set up the execution of the original contract, compliance with its terms by appellee, and the removal of the equipment under the writ of replevin. Damages were claimed for the rental value of the equipment removed, the loss of profits resulting from the removal, and for the monies expended for new equipment, installed to reduce damages. Counter-Claims also relat-

ing to the payment of monies under duress, and monies so paid were sought to be recovered.

The Jury returned the following verdict:

IN THE DISTRICT COURT FOR THE TERRITORY OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU.

ELECTRICAL RESEARCH PRODUCTS, Inc., a corporation,	)	
Plaintiff	)	No. 3167-A
vs.	)	
W. D. GROSS,	)	
Defendant.	)	

We, the Jury, empaneled and sworn in the above entitled cause, find for the defendant generally and against the plaintiff upon the issues presented by the First Cause of Action stated in the Complaint.

We, the Jury, empaneled and sworn in the above entitled cause, further find for the defendant, generally and against the plaintiff, upon the issues presented by the Second Cause of Action stated in the Complaint.

We, the Jury, empaneled in the above entitled cause, further find for the defendant generally and against the plaintiff upon the issues presented by the

First Counter-Claim pleaded in the Answer against the First Cause of Action set up in the plaintiff's Complaint; and in this connection we assess the defendant's damages as follows:

(1)	The rental value of the equipment taken from the "Coliseum" theatre at Juneau, under a writ of replevin in this action	$9,000.00
(2)	Damages resulting from the loss of profits to the defendant by reason of the removal of the of the equipment from the "Coliseum" theatre at Juneau....	$19,440.00
(3)	Damages resulting to the defendant because of monies expended to reduce damages resulting from the removal of the equipment from the "Coliseum" theatre at Juneau	$ 2,628.92

We, the Jury, empaneled and sworn in the above entitled cause, further find for the defendant generally and against the plaintiff upon the issues presented by the Second Counter-Claim to the First Cause of Action, and fix the amount of the recovery on said Counter-Claim at $1,725.77.

We, the Jury, empaneled and sworn in the above entitled cause, further find for the defendant generally and against the plaintiff upon the issues presented by the Third Counter-Claim, the same being the First

Counter-Claim to the Second Cause of Action, and assess the defendant's damages as follows:

(1) The rental value of the equipment taken from the "Coliseum" theatre at Ketchikan, under a writ of replevin in this action ..... $ 9,000.00

(2) Damages resulting from the loss of profits to the defendant by reason of the removal of the equipment from the "Coliseum" theatre at Ketchikan $12,320.00

(3) Damages resulting to the defendant because of monies expended to reduce damages resulting from the removal of the equipment from the "Coliseum" theatre at Ketchikan ..... $ 2,628.92

We, the jury, further find for the defendant generally and against the plaintiff upon the issues presented by the Fourth Counter-Claim, the same being the second Counter-Claim to the Second Cause of Action, and fix the amount of recovery on the said Counter-Claim at $1,692.72.

JOSEPH SIMPSON,
(Foreman)

(See Printed Rec. Page 124).

After the foregoing Statement of Facts had been printed, we were served with appellant's Brief, which also contains a Statement of Facts. There are a number of statements in this Statement of Facts of appel-

lants which are erroneous. This is especially true of that portion of the Statement entitled, "Undisputed Facts." In view of the fact, however, that these matters are fully discussed in connection with the discussion of the various Assignments of Error, where the erroneous statements of appellant are pointed out, we will not go into the matter at this point except, to say that we do not concur with the Statement of Facts presented by the appellant in a number of particulars.

ARGUMENT

The various errors assigned will be discussed in the order in which they appear in the assignment of errors.

FIRST ERROR ASSIGNED

CONSTRUCTION OF CONTRACT.

The first error assigned relates to an instruction given by the Court in connection with the construction of the original contracts. The instruction complained of is as follows: "And in this connection, I instruct you that the said agreements (of March 28, 1929) or either of them, do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment services."

The specific objection to this instruction, as stated by counsel for appellant, is that, "the omission of the

amount in paragraph 6 does not make the service free." (Pr. Rec. Page 129).

The exception as stated does not call the court's attention to any specific error of law; it does not point out any part of the contract referred to under which the contract required the defendant Gross to pay plaintiff for periodical inspection and minor adjustment service. In other words, it does not call the court's attention to the respect in which the court erred, or why the court erred. All the objection amounts to is that the omission of the amount, in paragraph 6, does not make the service free—that is to say, it is claimed that the omission of the amount in a particular place does not make the service free, but it is not pointed out where in the contract there is a provision that periodical inspection and minor adjustment service must be paid for. The exception taken would in no way aid the court in reaching the correct conclusion if there were anything wrong with the conclusion that the court had reached; for that reason, as we will point out from the authorities to be hereinafter discussed, the exception brings up nothing for review or re-consideration by this Court.

But the Court did not instruct the jury that the service was free. The Court merely instructs that the contract does not require payment for "inspection and minor adjustment service"; "service," as that term is employed in paragraph 6, is not referred to.

There is a wide difference in meaning between the term "service" as employed in paragraph 6, and the phrase "inspection and minor adjustments," as used in paragraph four and paragraph eight. But, first let us inquire into the effect of paragraph 6. The contract is upon a printed form, embodying many severable provisions, generally stated in separate paragraphs, separately numbered. The blanks in the other paragraphs were filled in, so as to make them effective; but the blanks in paragraph 6 were all left blank. The paragraph as it occurs in the contracts, reads as follows: "In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term, shall be payable on the Saturday next succeeding the "Service Day" and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products regular schedule of such charges as from time to time established. Under Products' present schedule, the service and inspection payment shall be $..... per week, which charge shall not be exceeded during the first two years of the period of said license and thereafter for the balance of the term of said license shall not exceed the sum of $..... per week."

Now the question is, what is the effect of this paragraph which the parties left incomplete by a failure to fill in the blanks. The contracts contain no authority to fill in the blanks—in fact, they contain no reference to paragraph 6 at all, although two typewritten provisions, relating to other matters, are added to the printed form. Nor is there any room for implied authority or separate understanding with relation to these blanks, for paragraph 20 expressly provides: "The parties hereto expressly stipulate that this agreement as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof, and that there is no other understanding, agreement or representation, express or implied, in any way limiting, extending, defining or otherwise relating to the provisions hereof or any of the matters to which the present agreement relates." (Pr. Rec. Page 186).

It was the obvious purpose of the parties to leave paragraph 6 incomplete and ineffective—leave it out of the contracts entirely, as though it had never been there. And this is in accord with the verbal testimony of the parties upon the subject. Appellant's witness Anderson, by whom the contracts were executed, on behalf of appellant, testifies as follows: "In view of the uncertain situation with respect to Alaska, the plaintiff company had no knowledge at the time of the negotiation of the contracts, exhibits 1 and 3, of the

probable cost of furnishing engineering service for the theatres in that territory."

Thereupon witness further testifies, over defendant's objection: "it was consequently unwilling to enter into a contract which would fix the amount of its compensation for the rendering of such service when the cost of rendering it was still an unknown quantity and was willing only to enter into such contract upon the understanding that the weekly charge for servicing would be made the subject of a subsequent agreement between the plaintiff company and the exhibitor. Accordingly, when the contracts, Exhibits 1 and 3, were executed, the amount of the weekly charge for servicing the equipment was left blank." (See Pr. Rec. Page 169-170.) A portion of this evidence was probably incompetent, in view of the provisions of the written agreement, and it was admitted over appellee's objection; but the important thing about the evidence is that it shows an unwillingness on the part of appellant to make paragraph 6 complete or effective at the time the contract was executed. Then too, Gage, appellant's agent, told appellee that the contracts had been executed with the service clause left out and that he would have to provide his own service man. (Ev. Gross, Pr. Rec. Page 117-118; Ev. Cawthorn, Pr. Rec. Page 476); Gross made provision to service his own equipment. (Pr. Rec. Page 318); Wilcox, appellant's Vice-President, said, "Gross has no service with us." (Ev. Gross Pr. Rec. Page 319; Ev. Lemieux, Pr. Rec. Page

802); no attempt was made by appellant to collect service charges until it attempted to secure a supplemental agreement providing for them. (Ev. Gross, Printed Rec. Pages 319-320); and, finally, appellant sought to bring about the execution of a subsequent agreement with a view of making paragraph 6 effective. It may be added that it was upon the supplemental agreement that appellant relied to recover service charges in this action. Obviously, it did not consider itself entitled to service charges under the original agreement at the time this action was brought. All this goes to show that all were agreed that paragraph 6 of the original contracts was and is of no effect.

But we are not compelled to rely upon the understanding of the parties, for the Courts have uniformly held that printed forms with the blanks left blank are ineffective, because incomplete, in so far as the provisions in which the blanks occur are concerned.

The exact point was before the Court in the case of Church vs. Nobel, 24 Ill. 292. It was an action on a lease contract.

According to the opinion, the defendant had agreed to do certain things under certain conditions, and "in addition thereto to pay the plaintiff the sum of $....." In affirming a judgment denying relief, it was said: "The party of the first part did not contract

to pay anything in addition, for blank dollars are no dollars. We cannot make contracts for parties; we can only interpret them to enforce them. We interpret this to mean that $..... dollars are the measure of damages agreed upon by these parties; and they are no dollars, and therefore nothing was to be paid."

The case of Rhyne vs. Rhyne, 66 S.E. 348, was an action on a bond containing a blank which had not been filled in. A judgment granting relief was affirmed because the amount could be ascertained from other parts of the contract; but the Court took the precaution of adding: "We recognize the general rule that if a blank be left in an instrument, the omission may be supplied only if the instrument contains the means of supplying it with certainty."

In the case of Lore vs. Smith, 133 So. Page 214, the Supreme Court of Mississippi was called upon to decide what effect was to be given to a clause in a deed of trust, upon a printed form, containing blanks that had not been filled in. In denying relief, it is said:

> "The omission to fill in the blanks in the future advance clause of the deed of trust indicates an intention that the clause should not become operative, unless an agreement can be implied therefrom that the grantee or cestui que trust should fill the blanks in accordance with the intention of the parties. We are not called upon to decide whether such an implication here arises;

> for the grantee or cestui que trust did not attempt to assert such a right, but recorded the deed of trust without filling the blanks. 'A writing is incomplete as an agreement where blanks as to essential matters are left in it, unless they can be supplied from other parts of the writing itself.' 13 C. J. P. 308, or unless and until such blanks are lawfully filled."

This case is on all fours with the case at bar.

In the light of what has been said, if, as counsel assumes, the instruction relates to service as that term is used in paragraph 6, the instruction is correct, for paragraph 6 was left incomplete and inoperative. However, the instruction is correct for still another reason. It deals with "inspection and minor adjustment services," as dealt with in paragraphs 4, and 8 of the contract. It is expressly provided that such services are not to be paid for.

The making of periodical inspections and minor adjustments is one thing; the rendition of service under paragraph 6 is quite another thing. In one case, an engineer looks over equipment that is in repair and makes such minor adjustments as may be required; in the other case, he repairs equipment that has been broken down and keeps it in repair. (Ev. Clayton, Pr. Rec. P. 783-784; Ev. Cawthorn, Pr. Rec. P. 472-474). That there is this distinction between the meaning of the phrase "periodical inspection and minor adjustments and the meaning of the term "service" as employed in paragraph 6, when used by those engaged

in the motion picture business, as testified to by appellee's witnesses above listed is a fact that was not denied by any witness upon the trial, not even by Wilcox, and no one was better qualified to speak upon this subject than he; he took the stand and testified concerning many matters, but he did not deny that Clayton and the other witnesses were correct upon this point. In fact Wilcox corroborates the testimony of the others, in this: periodical inspection and minor adjustments may be made periodically, but service must be rendered continuously to have any value at all, for the obvious reason that equipment must be in repair all the time in order to operate. In describing service as rendered by appellant (to everyone except Gross) Vice-President Wilcox says: "plaintiff also furnished a service man day or night on call whenever the theatre was running; the operator had nothing to do if anything was wrong except to call the office and get a service man right away." (Pr. Rec. P. 292.) Surely, this is something different from making periodical inspections and minor adjustments.

The contention made by counsel on page 21 of appellant's Brief that the only service which plaintiff agreed to render was the making of periodical inspection and minor adjustments, provided for in paragraph 4, and that therefore the word "service" as used in paragraph 6, must necessarily refer to the making of periodical inspections and minor adjustments, is entirely without force. In the first place, "periodical inspection

and minor adjustments" is a term not synonymous with the term "service." It may be service, but there is no more reason for saying that that is the particular service referred to in paragraph 6, than it is for saying that all the other service rendered by appellant under the contract is also referred to as the service contained in paragraph 6. Under paragraph 4, for instance, appellant agrees to render many kinds of service, and it is far more likely that the term "service" referred to in paragraph 6, refers to these many items of service, than to the "inspection and minor adjustment service," for the reason that there is nothing in the contract to show that these various kinds of service were to be rendered free, while the contract does show in express terms under paragraph 8, as we shall later point out, that the "inspection and minor adjustment service" is not to be paid for—that is to say, there is to be no extra pay for it. Appellee is to pay a rental charge of $1,050.00 for each machine per year, and it was obviously intended that this should cover and pay for these various items. The service referred to in paragraph 6 was simply the customary service rendered by the appellant to everyone that leased equipment from it. This is evident from the testimony of Vice President Wilcox, in which he says:

> "* * * Plaintiff did not under the old system service machines once a week; in the beginning for the first six weeks of operation in 1929 and 1930 we serviced once a week for the first six months; when I say a week it might have been eight days

one time and six another, but approximately every ten days; the second six months and thereafter, approximately every two weeks with the exception of very large de luxe houses, with a seating capacity of upward of 1,500 seats of which there were about 150 in the United States, which were serviced every week; plaintiff also furnished a service man day or night on call whenever the theatre was running; the operator had nothing to do if anything was wrong except to call the office and get a service man right away."
(Pr. Rec. P. 292).

The language of the contracts themselves, especially in the light of the evidence bearing upon the meaning of the terms employed, is clear.

INSPECTION AND MINOR ADJUSTMENTS

Paragraph 4 of the original contract provides: "Products also agrees to make periodical inspection and minor adjustments in the equipment after it shall have been installed." (Pr. Rec. P. 175).

Under the provisions of paragraph 4, Products agrees to train operators, keep an engineer in attendance to advise them for a week after installation, and to make periodical inspection and adjustments. All these provisions relate to the furnishing of such expert service as a vendor or lessor often furnishes in connection with the installation of any machine. This being a machine of extreme delicacy, the provisions might be expected to be expressed and inserted in the

contract—ordinarily they would be understood. Products is to train operators, supply an engineer for a week, and after that, it is not to set Gross adrift, but it is to make periodical inspections and make minor adjustments. All these provisions are grouped in one section, and their obvious purpose is to insure the smooth operation of equipment that is in a good state of repair—the matter of keeping the equipment in repair is dealt with under the provisions of paragraph 6.

The periodical inspection and minor adjustment was to be rendered without extra charge according to the express provisions of the contract. Paragraph 8 of the original contract provides: "The exhibitor also agrees upon rendition of invoices to pay for any service rendered and expenses incurred by Products' employees in connection with and for the benefit of the exhibitor, except for the regular periodical inspection and minor adjustment service heretofore provided for." (Pr. Rec. P. 178). The closing words of this paragraph "except for the regular periodical inspection and minor adjustment service heretofore provided for" are not discussed or referred to by appellant's counsel in his brief at all. In his brief, appellant's counsel deals with the contract as though it did not contain this provision at all.

The first portion of this paragraph provides in general terms that the exhibitor agrees to pay for any

service rendered for the benefit of the exhibitor. If nothing more were said the "periodical inspection and minor adjustment service referred to in paragraph 4 would have to be paid for. This would be so because the phrase "any service" is equivalent to all service. It is all inclusive. In order to avoid that construction, it was necessary to add the concluding portion of the sentence, which reads: "except for the regular periodical inspection and minor adjustment service heretofore provided for." Obviously, the purpose was to provide that the periodical inspection and minor adjustment service provided for in paragraph 4, was not to be paid for—that it was something that was to be taken care of by the high rental charge that was to be paid. If that was not the purpose, why was the clause inserted? Upon the trial, counsel for appellant contended that what the concluding clause really refers to is the service to be rendered under paragraph 6. Not, that this service should not be paid for; but that the clause should be construed as though it read: "except for the regular periodical inspection and minor adjustment service *the payment of which is* heretofore provided for." But if the payment of the service to be rendered had already been provided for, why provide that it should not be paid for? If the service was to be paid for anyway, why except it from a provision making a general provision for payment? Why speak of it at all? It would take care of itself. The courts do not presume that parties to a contract use idle and

unnecessary language; and it goes without saying that they will not resort to the interpolation of words in order to convert what is essential, plain and unambiguous into what is unnecessary, uncertain and meaningless.

Paragraph 4 of the original contract provides for the inspection and minor adjustment service, and paragraph 8 provides that Gross need not pay extra for it. It was the duty of the Electric Company under the original contract, to supply this service,, and a failure to do so would constitute a breach of the contract.

But this duty is later converted into a privilege. Under the contract, Products agrees to make inspections. So far the contract imposes a duty upon Products. But the contract also provides that the exhibitor shall permit Products to make inspections. (Par. 12, P. R. P. 179) that Products shall have the right to require the installation of new parts (Par. 4, P. R. P. 176) and that the exhibitor shall purchase them from Products and from no one else, (Par. 2, P. R. P. 173). Thus what was a duty is converted into a privilege—a privilege which makes of every service man a salesman with power to dictate what the buyer shall buy.

To determine what is meant by service, in paragraph 6, we need only turn to plaintiff's Ex. 2, which is paragraph 6 with the blanks filled in. This document does not deal with minor adjustments but with

service. Minor adjustments are required by equipment in repair; service is required by equipment out of repair—to service a machine is to keep it in repair. For this service the exhibitor is to pay a large amount weekly, while, according to paragraph 8 of the contract, he is not to pay extra for the minor adjustment service at all. The service is not to be periodical but continuous. If not continuous it would be valueless; if not continuous the amount charged would be ridiculous. The sum of $29.75 is to be paid weekly in advance. In advance of what? Obviously, in advance of the rendition of the service. If the service were not to be rendered continuously when needed throughout each succeeding week, it could not be paid weekly in advance. The document also provides that Gross is to pay for the use of air-planes and the like in case of emergency service visits. Now, what did the parties have in mind when they wrote this,—minor adjustments or breakdowns? Clearly, the latter. They were dealing with repairs, not with adjustments.

But, we are dealing with the original contracts. The Court instructed the jury that they do not require Gross to pay for "inspection and minor adjustment service." Even if the contracts did not expressly provide that this service is not to be paid for, the instruction would be correct. Nowhere in the contracts is there a provision requiring payment for any kind of service. If so, how much? The purpose of the supplementary contracts was to provide for payment under

paragraph 6. Prior to their execution there was nothing to be paid under that paragraph.

The effect of leaving the blanks in paragraph 6 is discussed from a somewhat different angle on page 65 of this Brief.

ASSIGNMENT NO. 2.

This assignment relates to the following language contained in the instructions:

> "And in this connection, I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts (of September 4, 1929) the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28, 1929, it cannot recover for such services."

(Printed Rec. Page 129).

The exception taken to this instruction is in the following language:

> "We take an exception to instruction No. 2 * * *. We take an exception to that part of the Court's instructions commencing with line 20 on page 13 (Par. 8) * * *." (Pr. Rec. Page 129-130; Pr. Rec. Page 1024).

It will be noted that the ground of the exception was not stated, so that the exception presents nothing for review, either under Rule 10 of this Court or under the general law upon the subject.

In the case of United States vs. United States Fidelity and S. Co., 236 U. S. 512; 35 Sup. Ct. R. 298-303, Mr. Justice Pitney, speaking for the Supreme Court says :

> "The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court."

The exact point has been passed upon by this court in a number of cases. Thus in the case of Sacramento Suburban Fruit Lands Co. vs. Johnson et. al., 36 Fed. 2nd. 925, it is said:

> "There are five specifications of error based upon exceptions to the instructions given, but these exceptions are insufficient, because in no case was the ground of the exception stated."

In Howard vs. Beck, 56 Fed. 2nd. 35, the effect of Rule 10 and the authorities bearing on this rule are considered and reviewed.

In the case of State Life Ins. Co. vs. Sullivan, 58 Fed. 2nd. 741-744, the exact point was again before this court. In that case it is said:

> "Appellant objects to two paragraphs of the charge given by the court to the jury. These ex-

ceptions do not state the ground of the objection, and are clearly insufficient to justify our consideration. The charge to the jury, according to the bill of exceptions, was frequently interrupted by the expressions "Exception noted, exception No. 16," and so on to and including Exception No. 24. These exceptions are insufficient to raise any proposition of law for the consideration of this court."

But there is nothing wrong with the instruction. The language objected to must be read in connection with what preceeds it and follows it. The whole instruction so far as pertinent reads:

> "The defendant also claims that the alleged contracts of September 4th, 1929, have no effect upon the defendant Gross, because they were executed without consideration.
>
> In this connection I instruct you that when a party promises to do what he is already legally bound to do, or does what he is already legally bound to do, neither such promise nor act is a valid consideration for another promise.
>
> And in this connection I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28th, 1929, it cannot recover for such services; or if you believe from the evidence that the "service" referred to in the alleged contracts of September 4th, 1929, is something different or in addition to the "inspection and minor adjustment service" referred to in the contracts of March 28th, 1929,

the plaintiff cannot recover therefor unless he has performed such service; and in this connection I instruct you further that there is evidence before you upon the question of what is meant by the term "service", when used in connection with the sale and use of motion picture sound equipment when used by those engaged in the business of supplying and dealing in motion picture sound equipment; and that if you find that this term "service" has a meaning when used by persons so engaged, other and different from its ordinary meaning, you must apply that meaning to the term as used in said supplemental contract of September 4th, 1929. The question of what is meant by the term when so used by persons so engaged, is a question of fact for the jury, and if the term when so used means something other and different from the "inspection and minor adjustment service" hereinbefore referred to, then there was and is a consideration for the alleged contracts of September 4th, 1929, and plaintiff would be entitled to recover therefor if it performed such "service", but would not be entitled to recover therefor unless it did perform and furnish such service, provided, of course, you find that the "service" mentioned in the supplemental contracts of September 4th, 1929, was not the same "service" provided for in Paragraph 4 of the contracts of March 28th, 1929." (See Pr. Rec. Page. 994-995.)

That the supplemental contracts of September 4th required a consideration to support them cannot be doubted. In volume six of Ruling Case Law at page 917—Contracts Par. 301—it is said:

"A valid consideration is an essential and indispensable element in every binding agreement.

> If a written contract is altered by agreement, such agreement must have the essential ingredients of a binding contract; and although it may have reference to, and indeed embody, the terms of the written contract, yet it must be founded on a new and distinct consideration of itself."

This is especially true of a contract such as the contracts P. Ex. 1 and 3, which contain no provision relating to their amendement or modification at a later date, but which do contain a provision which negatives the idea that there was any agreement or understanding, either express or implied, upon that subject or any other subject not covered by the express and complete agreement of the parties as expressed in the contract. Paragraph 20 reads in part as follows:

> "20. The parties hereto expressly stipulate that this agreement as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof, and that there is no other understanding, agreement or representation, express or implied, in any way limiting, extending, defining or otherwise relating to the provisions hereof or any of the matters to which the present agreement relates." (Printed Rec. Page 186).

Since a consideration was necessary, it requires no citation of authorities to show that the Court was right in instructing the jury that "when a man does what he is already legally bound to do, his act is no consideration for a promise."—this is fundamental.

ASSIGNMENT NO. 3.

It is assigned as error that the Court refused to give the following instructions:

> "You are instructed that the plaintiff claims that the amount to be paid for inspection and minor adjustment service was left in blank in paragraph six of each of the contracts of March 28th, 1929, plaintiff's exhibits Nos 1 and 3, because the amount thereof could not be determined at the time that those two contracts were made and that it was understood between plaintiff and defendant that the amount of that weekly charge should be fixed at a later date.
>
> "In this connection I instruct you, even though the amount of the weekly charge for inspection and minor adjustment services was left in blank in those original contracts, that does not mean that those services were to be rendered by plaintiff free; but the amount thereof to be paid by defendant may be shown by other evidence to have been agreed upon by the parties. The plaintiff alleges that the amount to be paid for such services was agreed upon between it and the defendant and that it was to be $29.75 per week for each theatre and plaintiff further alleges that this agreement was expressed in the supplemental contracts of September 4th, 1929, plaintiff's exhibits Nos. 2 and 4."

The exception taken to the refusal to give this instruction, is as follows:

> "The Court refused to give the foregoing instruction, either in words or substance, to which

refusal plaintiff, in the presence of the jury and before it retired for deliberation, excepted." (Pr. Rec. Page 976).

It will be noted that the ground of the exception is not stated. The attention of the trial judge was not called to any specific error to the end that he might correct it. As was pointed out in discussing the previous assignment, such an exception presents nothing for review. The rule that the ground of exception must be stated is as applicable to an exception to the refusal to give an instruction as to any other. It was so held by the Supreme Court of Washington in the case of Mono Service Co. vs. Kurtz, 17 Pac. 2nd., 29-31, where it is said:

> "The exception shown in the record is: "Plaintiff excepted to the refusal of the court to give said instruction, and the exception was by the court allowed."
>
> We have frequently held such an exception to be insufficient under the rules which now govern."

The Washington rule required exceptions to be taken to instruction given or refused, and required the exception to be sufficiently specific to apprise the trial judge of the points of law or questions of fact in dispute." Kowalski vs. Swanson, 34 Pac. 2nd. 454. Our rule 10 is general in its terms and relates generally to the charge, but its requirements do not differ substantially from the Washington rule. An exception

to the refusal to give an instruction is as much an exception to the charge as an exception to the giving of an instruction. In one case it is objected that the charge contains too little; in the other, that the charge contains too much—in either case the objection is to the charge. Moreover, the Washington rule merely states the general law upon the subject. (See also Richmond vs. Whittaker, 255 N. W. 681.)

Nor did the Court err in refusing to give this instruction. The first portion relates to what plaintiff claims. Clearly, the Court is not required to instruct the jury upon the contentions of the parties; although it may do so in so far as it is necessary to define the issue, and that was done by Instructions Nos. 1 and 2. The Court could not instruct that there was an understanding between the parties that the amount of the weekly service charge should be filled in at a later date, not only because there is no evidence that any such arrangements existed but also because Section 20 of the contracts (previously quoted) precludes the existence of any such arrangement. The Court is then asked to charge that even if the amount of weekly charge for inspection and minor adjustments was left blank, that this did not mean that these services should be rendered free. But the amount to be paid for inspection and minor adjustments was not left in blank. Paragraph 8 of the contract, as has already been shown, expressly provides that the inspection and minor adjustment service is not to be paid for at all. What was

left blank was the amount to be paid as weekly service charges for service as used in paragraph 6; and this service, as has already been pointed out, is a very different thing from inspection and minor adjustments. The court is also asked to tell the jury that the amount to be paid for inspection and minor adjustments might be shown to have been agreed upon by other evidence. But paragraph 20 provides that there were no other agreements or understandings, either express or implied. True, there might be a subsequent agreement, but there was no evidence of it. The supplemental agreements of September 4th, do not relate to inspection and minor adjustments but to service. These form the basis of the action, and their validity is questioned on many grounds. Surely, the court was not required in this manner to tell the jury as here requested what plaintiff claimed for them—that whole matter had been covered by instructions Nos. 1 and 2.

Then, also, if the court was right in refusing any part of this proposed instruction, it was right in refusing the whole, for it is not the duty of the court to separate the wheat from the chaff in such cases.

ASSIGNMENT NO. 4.

It is urged that the Court erred in instructing the jury as follows:

> "In this connection I instruct you that under the original agreement of March 28th, 1929, no agent or employee of the plaintiff is author-

ized to alter or modify those agreements or either of them in any way, unless such alteration or modification shall be approved in writing by the president or vice-president of the plaintiff corporation, or by such representative as may from time to time be designated in writing by either of such officers; and I instruct you further that there is no evidence that these alleged contracts were approved by either of such officers. There is before you, however, evidence to the effect that "Anderson" had authority to effect certain contracts for and on behalf of plaintiff, and that said contracts were later ratified and confirmed by the plaintiff by its Board of Directors. I therefore instruct you that these alleged agreements of September 4th, 1929, have no binding force or effect unless they were executed and approved in accordance with said provisions of the original contracts, unless you find the parties afterwards voluntarily ratified these agreements."

To this instruction appellant took an exception in the following language:

> "We except to that part of the court's instruction No. 3, commencing on line 21, page 15, Par. 4, down to the remainder of that particular instruction 3, on the ground it does not state the true principle of law applicable to written instruments or contracts particularly, and that neither party is bound by the particular provision that only a president or vice-president could change these contracts if they afterward agree to change them otherwise." (Pr. Rec. Page 1025-1026).

Here is an attempt to state the grounds of the exception; but the grounds, as stated, are too indefinite, uncertain, and incomplete—they are not such as to di-

rect the attention of the trial court to any particular misstatement of law in the instruction. It is objected that the instruction "does not state the true principle of law applicable to written instruments;" but there are many legal principles applicable to written instruments, and it is not stated which of these is violated, nor is the court's attention called to the true principle that should govern—so far we have nothing but a general objection. The objection continues, "and that neither party is bound by the particular provision that only a president, or vice-president could change these contracts if they afterwards agree to change them otherwise"; but the instruction does not deal with this matter at all. The court does not instruct that the provision relating to the authority of agents in any wise limit the parties themselves. The instruction deals solely with the authority that third parties—agents and representatives—can exercise on behalf of the parties under the provisions of the contract and with the manner in which this authority must be exercised. No part of the objection, therefor, calls the court's attention to any mis-statement in the instruction.

In the case of Allison vs. Standard Air Lines, 65 Fed. 2nd. 668, where this court had before it an exception that was uncertain in its terms, it is said:

> "These purported exceptions are not clear. They fall far short of that degree of succinctness and particularity that the courts have exacted of exceptions to instructions, on the ground that the

lower court should be given a fair chance to correct any alleged errors in its instructions before the case is submitted to the jury.

We have studied these two purported exceptions very carefully, and we are convinced that they are fatally ambiguous, equivocal, and indefinite. Nowhere is there a specific statement of the error alleged to have been committed by the court."

In the case of Davis vs. North Coast Tranps. Co. 295 Pac. 921, the Supreme Court of Washington had before it an exception reading as follows:

"Defendants except to instruction number three for the reason that the same is not a statement of the law applicable to the case and not justified or warranted by the facts."

It will be noted that this exception was in some respects at least like the exception now being considered. In passing upon the sufficiency of the exception, it is said:

(4) This exception in no way called the court's attention to the fact that in the instruction there was an incorrect statement of the law in that it was said that contributory negligence, in order to defeat a recovery, must have been the proximate cause of the injury. In Kelly v. Cohen, 152 Wash. 1, 277 P. 74, 75, it was held that an exception to an instruction in this language, "Defendant excepts to instruction No. 5, upon the ground and for the reason the same is not a correct statement of the law, and not based upon the evidence in this case," was too general and was not a compliance

with the rule requiring instructions to be sufficiently specific to apprise the judge of the points of law or questions of fact in dispute.

In a later case, Parton v. Barr, 24 Pac. 2nd. 1070, this language is employed by the Supreme Court of Washington:

> "Nor are we permitted to consider the question raised with reference to instruction No. 16-A, because, while exceptions to it were taken in time, that is, after the jury retired and before reception of the verdict, nevertheless the exceptions were not "sufficiently specific to apprise the judge of the points of law or questions of fact in dispute." Rule of Practice 6, 159 Wash. p. lxi; Rem. Rev. Stat. 308-6. The exceptions to the instruction were "that it is not a correct statement of law, and that the instruction is confusing to the jury." Such exceptions are fatally defective."

Nor did the court err in giving this instruction. In order to understand it, it must be read in the light of what precedes it. It is preceded by the following:

> "The plaintiff claims that the original contracts of March 28th, 1929, were mutually modified by the execution of two new supplemental agreements under date of September 4th, 1929.
>
> It is then alleged that the defendant agreed by these alleged supplemental agreements to pay a weekly service charge of $29.75 under each contract. In opposition to this claim the defendant maintains in the first place, that these alleged contracts of September 4th, 1929, were not executed by the parties at all, in that they were not

signed by the plaintiff corporation, and in that the name of the plaintiff corporation does not occur in the body of the instruments.

In this connection I instruct you that the alleged contracts are signed by one "Anderson" who signed the same as "Comptroller" without further describing himself, and that the question of whether said "Anderson" was acting for himself or for the plaintiff corporation is a question of fact to be determined by you under the evidence and these instructions." (Pr. Rec. Page 996).

The first portion of the language excepted to is a mere statement, word for word, of the language of the original contracts. These contracts provide:

"No agent or employee of Products is authorized to alter or modify this agreement in any way unless such alteration or modification shall be approved in writing by the President or a Vice-president of Products or by such representative as may from time to time be designated in writing by either of such officers." (Pr. Rec. Page 186).

The alleged contracts referred to in the instruction are upon the printed letter-head of appellant and are as follows:

"PLAINTIFF'S EXHIBIT NO 2.

ELECTRICAL RESEARCH PRODUCTS, INC.
Acoustic Department
250 West 57th Street
New York, N. Y.
Subsidiary of
WESTERN ELECTRIC COMPANY
Incorporated

September 4, 1929.

Mr. W. D. Gross,
Coliseum Theatre,
Juneau, Alaska.

Dear Sir:

Referring to our agreement with you dated March 28, 1929, for the installation and use of Western Electric Sound Equipment in the Coliseum Theatre at Juneau, Alaska—

This agreement was executed with the provision left blank relating to weekly service payments, in order that the amount thereof might be later determined.

It is proposed that this provision of the agreement be now made definite, and that in order to give effect thereto, the above mentioned agreement be modified by striking out paragraph 6 thereof (which, as above stated, was left blank as to the amount of the charge) and inserting in lieu thereof the following:

6. In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term shall be payable on the Saturday next succeeding the "Service Day" and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products' regular schedule of such charges for theatres in Alaska as from time to time established. Under Products' present schedule, the service and inspection payment shall be $29.75 per week, which charge shall not be exceeded, pro-

vided, however, that the Exhibitor agrees to reimburse Products for any extra expense incurred by Products because of the use or airplane or other extraordinary means of transportation incurred in connection with emergency service visits.

Will you kindly indicate your acceptance of the above by signing and returning to us one copy of this letter.

Very truly yours,

(Signed) R. E. ANDERSON,
Comptroller.

Accepted:

W. D. GROSS,

Exhibitor's signature witnessed by:

J. A. GAGE."

(Pr. Rec. Pages 189-190).

Ex. 4 is exactly like ex. 2 except that it relates to the Ketchikan theatre.

It will be noted that these agreements do not purport to be the agreements of appellant. Appellant's name is not even mentioned in them. True, they are written on appellant's letter-head, but the letter-head forms no part of an agreement written under it. If it did, many people—hotel-keepers, for instance—might find themselves entangled in strange and unlooked for complications. Happily, the courts have adopted a rule that prevents this. The rule is that printed matter in the heads of letters upon which a contract is written,

which is not referred to in the writing, is not a part of the contract.

Summers vs. Hibbard, 153 Ill. 102, 38 N.E. 800.

Lumber Co. vs. McNeeley, 108 Pac. 621.

In Summers vs. Hibbard it was held that the words, "All sales subject to strikes and accidents" printed on the caption of the paper on which was written the unqualified acceptance of a contract of purchase did not have the effect of reading them into the agreement thereby consummated. The court said:

> "The mere fact that appellants wrote their acceptance on a blank form for letters at the top of which were printed the words "all sales subject to strikes and accidents," no more made those words a part of the contract than they made the other words there printed, "Summers Bros. & Co. Manufacturers of box-annealed common and refined sheet-iron," a part of the contract. The offer was absolute. The written acceptance which they themselves wrote was just as absolute. The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letterheads would not have the effect of preventing appellants from entering into an unconditional contract of sale."

If, as the court says, the name of Summers and Co. did not become a part of that contract, the name of the Electrical Research Products Co. did not become a part of the contract now being discussed.

The second case cited follows the first.

These contracts, ex. 2 and 4, do not contain appellant's name and do not refer to the letterhead and they were not signed by appellant but by one Anderson who adds the word "Comptroller" to his signature without indicating who he is comptroller for. Nor does the letterhead show Anderson to be the comptroller for appellant. Now it is the rule that where an instrument is signed by an individual who signs as agent or representative it may be shown that he acted for a principal described in the writing; but in this case the alleged principal is not even referred to in the writing. Nor is the word "comptroller" synonymous with the word "agent"—a comptroller is not an agent at all. A comptroller, generally speaking, is one who examines accounts, not one who exercises the authority of another.

Nor is this all, ex. 2 and 4 refer to the contract to be modified as one relating to the "installation and use of 'Western Electric Equipment'." The original contracts are not for Western Electric equipment but for "Type 2-S equipment." It is true that this equipment is often referred to as Western Electric equipment, but the term Western Electric is not used in describing the equipment. The only reference to Western Electric Equipment in the original contract is in Par. 23, which provides for the termination of a previous agreement which did relate to Western Electric equipment. (Pr. Rec. Page 187).

Nor is there anything in the Record to show that Anderson had authority to execute these agreements in his own name as comptroller or otherwise and bind the company by so doing. His authority is defined in the two resolutions of the board of directors, as authority "to sign in the name and on behalf of the company contracts, etc." (See Rec. Page 192 P. R. and Page 193 Pr. Rec.) These resolutions certainly do not authorize Anderson to sign contracts in his own name.

The portion of the charge that submits the issue to the jury immediately precedes the portion specifically complained of, and is as follows:

> "In this connection I instruct you that the alleged contracts are signed by one "Anderson" who signed the same as "Comptroller" without further describing himself, and that the question of whether said "Anderson" was acting for himself or for the plaintiff corporation is a question of fact to be determined by you under the evidence and these instructions." (Pr. Rec. Page 996).

The appellant takes no specific objection to this portion of the instruction; but the instruction must be considered as a whole, so that it becomes necessary to inquire into the whole matter, at least to some extent in order to show that the issue was fairly presented to the trial jury.

Turning now to that portion of the exception which reads: "that neither party is bound by the particular provision that only a President or Vice-Presi-

dent could change these contracts if they afterwards agreed to change them otherwise". The provision of the contract referred to in the exception reads:

> "No agent or employee of Products is authorized to alter or modify this agreement in any way unless such alteration or modification shall be approved in writing by the President or a Vice-President of Products or by such representative as may from time to time be designated in writing by either of such officers." (Pr. Rec. Page 186).

There is no evidence in the Record tending to prove that the contracts in question were approved in writing or otherwise by the President or Vice-President or by any other representative designated by such officers.

Now, where did Anderson's authority come from? The board of directors had authorized him to make contracts in the name of and on behalf of the company, but not in his own name. In any event the resolution did not comply with the provision of the contract because the board is not the President or Vice-President. Then, too, the action of the board was something to which Gross was not a party and about which he was not informed. Gage told him nothing about Anderson (Ev. Gross, R. P. P. 325). Nor could Anderson have power to modify this particular contract under any general authority conferred on him in the face of the specific limitation upon such authority contained in this contract. It requires no extended discussion to show that in such case the general authority

would be limited by a specific limitation such as that contained in the contract. Let us put the shoe on the other foot. Let us suppose that the appellee should bring suit to enforce these contracts and that appellant should set up Anderson's lack of authority as a defense. Does anyone suppose that Gross could prevail? He had solemnly agreed with appellant that there should be a limitation upon Anderson's power, and no subsequent agreement had removed this limitation. The consideration that would prevent a recovery by appellee, would also prevent a recovery by appellant.

Seemingly counsel invokes the legal principle, that if parties have the power to contract, they have the power to modify the contract made in any way notwithstanding limitations upon their power in this regard by the terms of the contract. But this stipulation is not a limitation upon the powers of the parties in respect to a modification of the contract; it merely provides that third parties, agents of appellant, shall not have power to bind appellant except in the manner prescribed. Now, it is idle to say that this provision has no legal effect—it is not against public policy—there is nothing wrong about it. The parties themselves may ignore limitations placed upon their own power, but this does not mean that third parties can ignore limitations upon that authority to which the parties have agreed. To adopt counsel's view would be equivalent to saying that under the provision a third

party cannot act except in the manner prescribed unless he chooses to act in some other manner.

The indefinite character of the exception has compelled us to cover a field much wider than the field we would have been obliged to cover if the exception had been more definite; and if the case were less important; we would be extremely reluctant to trespass further upon the time of the court by further discussing this assignment. But we feel compelled to call the court's attention to the fact that even though the court erred in giving this instruction, the error would be harmless, in view of the fact that the contracts, ex. 2 and 4, are void for other reasons and have, in any event, not been complied with by appellant.

First of all the Record is such that, as a matter of law, the signature of appellee, Gross, was obtained by duress. As has been pointed out, Gross and Cawthorn testify to facts that constitute duress. Appellant produced no evidence to contradict their statements except Gage, who was said to have made the threats. If Gage had denied these statements the question would have been one for the jury; but he did not in law deny them. True, he testifies that there were no threats and that the signature was voluntarily affixed; but he also made this statement:

> "I told him frankly that he must live up to the terms of his agreement or return the equip-

> ment; I said "If you don't want to carry out your agreement, all right." I used such illustrations as "if you do not pay your telephone bill, your telephone will be disconnected." I pointed out to him that in accordance with his contract he was already in default and that it was only our leniency that kept him going as long as he did; without undue persuasion he signed the agreement and paid for thirty-two weeks' back service charges, together with some small amounts, bills of approximately $15.00; we discussed the question of payments and I told him that if he was to continue the use of the equipment he would have to perform all the provisions of the contract, including the payment of the weekly service charges." (Pr. Rec. Page 928).

Now, the general denials relating to threats made by Gage must yield to his specific statements upon that point. His admission of what he told Gross "frankly" is simply a mild, but neverthless effective, admission of what Gross and Cawthorn say he said. This admission leaves nothing for the jury to pass upon, so that duress is proved as a matter of law. If so, it doesn't matter whether the appellant did or did not execute the contracts.

Then, too, the contracts on their face show that they lack consideration. Appellant does not agree to do a single thing; it is only Gross that assumes obligations. The charge is to be paid as a service charge, but appellant does not agree to render the service. Nor does it help matters to say that the court will imply a covenant requiring the rendition of the service which

is to be paid for. If what seems to be the contention of counsel that "service" and "periodical inspection and minor adjustments" are synonymous terms, then the rendition of service would be no consideration for the reason that appellant was already legally bound to furnish "periodical inspection and minor adjustments." If the term "service" means something else—something additional—then the answer is that the service was never rendered. Ordinarily, the question of whether this service were rendered would be a question of fact for the jury; but in this case the uncontradicted evidence is such that the question becomes one of law.

In testifying to what service consisted of, Vice-President Wilcox testified:

> "plaintiff also furnished a service man day or night on call whenever the theatre was running; the operator had nothing to do if anything was wrong except to call the office and get a service man right away." (Pr. Rec. Page 292).

Now, if that is what service consists of, and Vice-President Wilcox would bind the corporation even if there were no other evidence upon the subject, there is not a scintilla of evidence tending to prove that any service was ever rendered. There never was a time when appellant kept a service man on call so that appellee could get service right away if anything went wrong. Appellant does not claim to have rendered Gross any service. All appellant claims is that one of its service men visited appellee's theatres at inter-

vals of about one month to make inspections, and, as their engineer Lawrence says, to sell parts and new equipment. It is not claimed that these service men ever repaired anything; although the record shows that the equipment was often out of repair, and that in each instance it was repaired by appellees own men—no service man was ever in sight when needed. At first, service men were sent up from Seattle—they stopped off at Juneau and Ketchikan while the boat was in port; later, Lawrence was kept in Alaska, but he was kept in Western and Interior Alaska most of the time, where he was far more inaccessible than he would have been if he had been in New York. With trains running on a one train a week schedule and steamers running as best they can, it ordinarily takes longer to get from Fairbanks and Anchorage to Juneau than it does from New York. Anyway, appellants never attempted to do more than render "periodical inspection and minor adjustment service"—the trips were made about once a month—seemingly just about often enough to keep the Alaska theatres supplied with parts and such newfangled equipment as appellant brought out from time to time. It follows therefor that there is no evidence that "service", as Vice-President Wilcox admitted it should be, was ever rendered—in fact, no attempt to do so was ever made. As a matter of law, therefore, appellant did not comply with the terms of the contract, so that it becomes wholly immaterial whether or

not the contract was properly executed by Anderson on behalf of appellant.

In its brief appellant asserts that the court erred in charging that the contract, to become valid, must be ratified by both parties, while appellant urges that ratification by appellant would be sufficient. The correctness of appellant's contention cannot be conceded; but even though it were correct it could avail nothing, because the point was not called to the attention of the trial court by any exception or objection at any time in any manner.

ASSIGNMENT NO. 5.

It is assigned as error that the court refused to instruct the jury as follows:

> "The defendant claims that under the original contracts of March 28th, 1929, plaintiff's exhibits Nos. 1 and 3, no agent or employee of the plaintiff corporation is authorized to alter or modify these contracts, or either of them, in any way unless such alteration or modification shall be approved by the president or a vice-president of the plaintiff corporation or by such representative as may from time to time be designated in writing by either of such officers.
>
> "You are instructed that the plaintiff has submitted evidence tending to show that R. E. Anderson did have authority from the plaintiff corporation to execute the supplemental contracts of September 4th, 1929, plaintiff's exhibits Nos. 2 and 4, for and on its behalf and that his action in making these supplemental contracts was authorized and approved by the plaintiff corporation

through its board of directors, and if you believe this evidence to be true then the requirements of the original contracts relative to altering or modiflying them, have been complied with."

To this ruling of the court the appellant took the following exception:

"The Court refused to give the foregoing instruction, either in words or substance, to which refusal plaintiff, in the presence of the jury and before it retired for deliberation, excepted." (Pr. Rec. Page 977).

Here again the grounds of exception were not stated; and, in view of what has already been said, the action taken by the court was so clearly correct that it is not necessary to say anything further about it.

ASSIGNMENT NO. 6.

The sixth error assigned is as follows:

"The Court erred in overruling the plaintiff's demurrer to the second and fourth counterclaims for failure to state facts sufficient to constitute a counterclaim to the amended complaint herein."

The demurrer appears on page 77 of the printed record and what purports to be an order overruling it with an exception to the ruling appears on pages 78-79 of the printed record; but neither the demurrer nor the order overruling it, in which the exception is incorporated, was made part of the record by bill of exceptions.

The Alaska statute, providing what the judgment

roll shall contain, after referring to cases where the judgment is by default, reads as follows:

> "In all other cases he shall attach together in like manner the summons and proof of service, the pleadings, bill of exceptions, all orders relating to change of parties, together with a copy of the entry of judgment, and all other journal entries or orders in any way involving the merits and necessarily affecting the judgment." (Compiled Laws of Alaska, Sec. 3711, page 738).

Now, the demurrer is a pleading and therefor part of the record; but the order overruling it is not an order that affects the merits or that necessarily affects the judgment. This is especially true in a case like this, where it is not assigned as error that the verdict of the jury relating to this counterclaim is not supported by sufficient evidence. In such case, the court will assume that there was sufficient evidence, and that, if there was anything wrong with the facts as pleaded, the pleadings were amended to conform to the proof.

Then, also, the court submitted the issue to the jury by instructing them as to just what was necessary to permit a recovery on these counter-claims. (Instruction No. 9, P. R. P. 1009). To the giving of this instruction no exception was taken and the giving of it was not assigned as error. The failure to except to the giving of this instruction constitutes a waiver on the part of the appellant, to any defect or deficiency in either the pleadings or the evidence in so far as they

relate to the issue so submitted to the jury without objection. A failure to object made the instruction the law of the case; if so, it must be presumed that the giving of it was warranted by the proceedings previously had—in other words, the pleadings and evidence must be presumed to have been sufficient.

But, there is nothing wrong with the pleadings in this case. The point sought to be urged is that duress is not sufficiently pleaded. Both counterclaims referred to in the exception are substantially the same except that one refers to the Juneau and the other to the Ketchikan contract. The second counterclaim provides in part :

> "That the defendant is, and at all times hereafter mentioned, was the owner of a motion picture theatre in the City of Juneau, which said theatre is known as the Coliseum Theatre.
>
> That for the purpose of equipping said theatre, the defendant did, on the 28th day of March, 1929, enter into a written contract with the plaintiff, a copy of which said contract is attached hereto, marked EXHIBIT "A" and is hereby referred to and made a part hereof.
>
> That under the provisions of the contract above set forth, the plaintiff did install, in the defendant's Coliseum Theatre at Juneau, the equipment described in said contract as the equipment which the plaintiff agreed to install in accordance with the terms of said contract. And the defendant paid to the plaintiff, the full sum of Ten Thousand Five Hundred Dollars ($10,500.00), as the principal, and interest in accordance with provisions of said contract, and in addition thereto, paid the sum of

Two Hundred Five Dollars ($205.00) freight, and Twenty-one ($21.00) cartage on said equipment.

That on or about the 30th day of December, 1929, the plaintiff threatened to remove and take from the possession of the defendant, all the equipment heretofore installed by it in the Coliseum Theatre as aforesaid, and deprive the defendant of the use thereof unless the defendant paid the plaintiff the sum of One Thousand Nineteen Dollars ($1,019.00), which defendant had not contracted to pay, and which was not due plaintiff, for pretended services, which the plaintiff never rendered, and told the defendant, then and there, that it had the power and the authority to carry out its said threats, and would do so if said amount were not immediately paid. That at the time said threat was made to the defendant, he had not yet fully paid the Ten Thousand Five Hundred Dollars ($10,500.00), due the plaintiff under the contract of March 28, 1929, although all payments due on account thereof had been paid, and the defendant was cognizant of the fact that a removal of said equipment would ruin his business, destroy the good-will he had established, and result in financial losses. The defendant not being sufficiently learned in the law to know his rights under the contract of March 28, 1929, and believing that the plaintiff had the power to carry out its said threats, and would carry out its said threats, then and there paid the plaintiff the sum of One Thousand Nineteen Dollars ($1,019.00), because of the threats so made by the plaintiff, and under duress as aforesaid. And thereafter the plaintiff continued to threaten the defendant that unless he paid further amounts it would disconnect the equipment, and defendant believing that the plaintiff could and would carry out the threats, paid the plaintiff the following additional

amounts: February 10, 1930, $119.00; April 2, 1930, $238.00; November 1, 1930, $208.25; making a total of One Thousand and Five Hundred Eighty-Four Dollars and twenty-five cents ($1,584.25). (Pr. Rec. Page 44 et seq.).

DURESS.

At the early common law, duress consisted of imprisonment or of threats to do great bodily harm of sufficient severity to overcome the will of a courageous person. Later, duress of goods was recognized, and the rule was relaxed so that the severity need only be such as to overcome the will of a person of ordinary firmness. In this country, however, this arbitrary rule has been supplemented by a rule more conformable to reason. Here it is generally held, especially in the late cases, that, since assent is a necessary element in a contract, any act or threat on the part of one party to a contract which is such as to overcome the free will of the other party, is duress.

As early as 1877, Mr. Justice Field, speaking for the Supreme Court in the case of Radich vs. Hutchins, 95 U.S. 210, says: "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another from which the latter has no other means of immediate relief than by making the payment." Here threats against

the person and property are placed in the same class—either is held sufficient to constitute duress. In this case the Court had before it a payment which was claimed to have been made under duress; but, in this respect, the making of a payment does not differ from the making of a contract or the doing of some other act, so that the rule would be the same. The case, however, that probably had more to do with the establishment of the modern doctrine than any other case, is the case of Galusha vs. Sherman, decided by the Supreme Court of Wisconsin and reported in 81 N. W. 495. The opinion was written by Justice Marshall, who reviews the decisions and traces the growth and development of the law upon the subject in a way that leaves but little to be said. In summing up the result, Justice Marshall says in part:

> "From the foregoing it will be seen that the true doctrine of duress, at the present day, both in this country and England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or a member of his family, as to deprive him of his free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetence to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion remedial by an appeal to a court of equity. The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage; and no longer gauges the acts

> that shall be held legally sufficient to produce duress by any arbitrary standard, but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value taken from him."

In the course of the opinion, also, Justice Marshall quotes with approval the language of the Supreme Court of Alabama, as follows:

> "The guilt or innocence of the alleged wronged party, or the lawfulness or unlawfulness of the threats, are immaterial, the material and only material question being, Was the threat made for the purpose of overcoming the will of the person threatened, and did it have that effect, and was the contract thereby obtained?"

This statement is quoted with approval in a great number of the late cases.

The law upon this subject as it is at present recognized by the Federal Courts is fully stated in the case of Winget vs. Rockwood, 69 Fed. 2nd. 326, decided by the Circuit Court of Appeals for the Eighth Circuit, in 1934. In that case threats to do what would result in financial loss to a business enterprise were held to be duress. In the course of the opinion it is said: "Under the ancient common-law rule, legal duress existed only where there was such a threat of danger as was deemed sufficient to deprive a 'constant and courageous man of his free will.' Under this doctrine the re-

sisting power which every person was bound to exercise for his own protection was measured not by the standard of the individual affected, but by the standard of a man of courage. This rule was later modified to the extent that the standard was changed from that of a 'constant and courageous' man to that of a person of 'ordinary firmness'; but in these modern and less heroic days, the standard of resistance by which to test the alleged wrongful acts of duress and coercion has been further modified and softened. The trend of modern authority is to the effect that a contract obtained by so oppressing a person by threats as to deprive him of the free exercise of his will may be voided on the ground of duress. What constitutes duress is a matter of law, but whether duress exists in a particular transaction is usually a matter of fact. Meyer vs. Guardian Trust Co. (C.C.A. 8(296 F. 789, 35 A.L.R. 856. There is no legal standard of resistance with which the victim must comply at the peril of being remediless for a wrong done, and no general rule as to the sufficiency of facts to produce duress. The question in each case is whether the person so acted upon, by threats of the person claiming the benefit of the contract, was bereft of the quality of mind essential to the making of a contract, and whether the contract was thereby obtained. In other words, duress is not to be tested by the character of the threats, but rather by the effect produced thereby on the mind of the victim. The means used, the age, sex, state of health, and mental characteristics of the victim are all evi-

dentiary, but the ultimate fact in issue is whether such person was bereft of the free exercise of his will power. International Harvester Co. vs. Voboril (C.C.A. 8) 187 F. 973; Lipman, Wolfe & Co. vs. Phoenix Assur. Co. (C.C.A. 9) 258 F. 544; Adams vs. Irving Natl. Bank, 116 N.Y. 606, 23 N.E. 7, 6 L.R.A. 491, 15 Am. St. Rep. 447; Illinois Merchants' Trust Co. vs. Harvey, 335 Ill. 284, 167 N.E. 69; Beard vs. Beard, 173 Ky. 131, 190 S.W. 703, Ann. Cas, 1918 C, N.W. 495, 47, LRA. 417; Welch vs. Beeching, 193 Mich. 338, 159 N.W. 486; Nebraska Mutual Bond Ass'n. vs. Klee, 70 Neb. 383, 97 N.W. 476."

In another late Federal case, Henderson vs. Plymouth Oil Co. 13 Federal 2nd. 932-941, the Court had occasion to pass upon the validity of a note given under a threat to prosecute the maker's son. In passing upon this question the principles that underly the law relating to duress caused by threats are discussed. The portion of the opinion relating to this subject reads as follows:

> "It may be stated as an established rule that any contract produced by actual intimidation is voidable, not only where the circumstances were sufficient to intimidate a man of ordinary firmness but was sufficient to, and did, intimidate the particular person who was the subject of the coercion. It is also true that criminal proceedings may be regular, on a charge for which there is a probable cause, and yet, if the arrest is made for the purpose of extortion, for the purpose of compelling the doing of that which otherwise would not

have been done, duress exists, and the contract is voidable. It is said in Hackett vs. King, 6 Allen (Mass.) 58; "Though a person is arrested under a legal warrant and by a proper officer, yet if one of the objects of the arrest is thereby to extort money, or enforce the settlement of a civil claim, such arrest is a false imprisonment by all who have directly or indirectly procured the same, or participated therein, for any such purpose; and a release or conveyance of property obtained by means of such arrest is void."

"Broadly stated, the law will not tolerate the employment of criminal process for the enforcement of a civil liability. Fillman vs. Ryan, supra. In International Harvester Co. vs. Voboril, 187 F. 973, 110 C.C.A. 311, it was held that duress may be caused by threats of criminal prosecution of husband, wife, children, or other near relative, though no crime has in fact been committed or prosecution begun. If the contracting party has been so put in fear as to be deprived of the free will-power essential to contractual capacity, the transaction may be avoided. In Galusha vs Sherman, 105 Wis. 263, 81 N.W. 495, 47 L.R.A. 417, the subject of duress is elaborately considered. The able opinion of Judge Marshall is epitomized in these words:

"The material and only material question being: 'Was the threat made for the purpose of overcoming the will of the person threatened, and did it have that effect, and was the contract thereby obtained?' "

Upon the question of what constitutes duress the more recent decisions of the state courts are in harmony with those of the federal courts.

The case of Rose vs. Owen, 85 N.E. 129, an Indiana case decided in 1908, is directly in point. The plaintiff, a real-estate agent, had a very doubtful claim against the defendant for commissions arising from the sale or transfer of land to a plantation company organized by the defendant. Plaintiff threatened to institute receivership proceedings against the plantation company unless defendant contracted to pay plaintiff $35,000 in installments. This defendant contracted to do in order to save the business of the plantation company and his reputation from being falsely attacked, and afterwards paid $12,000 on such contract, not as a ratification thereof, but to prevent the bringing of an action for a receiver by plaintiff until it was safe to repudiate the contract. It was held that the contract was voidable for duress, notwithstanding such payment. In the course of the opinion it is said: "The question in this case is whether there can be duress by threats such as are alleged in the counter-claim. Bush vs. Brown, 49 Ind. 573, 577, 19 Am. Rep. 695, the Court said: To give validity to a contract the law requires the free assent of the party who is to become chargeable thereon, and it therefore avoids any promise extorted from him by terror or violence, whether on the part of the person to whom the promise is made, or on that of his agent. Contracts made under such circumstances, are said to be made under duress. In Parmentier vs. Pater, 13 Or. 121, 126, 9 Pac. 59, 61, it is said:

> "Any course calculated to excite alarm which is resorted to by one party in order to coerce another to do an act detrimental to his rights and advantageous to the former is unlawful; and I do not think the law should make any distinction between means that are adopted in order to secure such ends. Where the threats actually or may reasonably coerce the will of the party threatened, and the contract results from such coercion there is duress. The injury feared would result if the receivership action was instituted, regardless of the merits of the case. Whatever defenses appellee or said company might have would be unavailable to avert the threatened injury since it must result before such defense can be interposed."

It was claimed that the contract was ratified by the payment of the $12,000; but the Court held that the plaintiff paid the money because he did not feel safe to do anything else, and that payment under such circumstances did not constitute ratification.

So, also, in the case of Harris vs. Carey, 71 S.E. 551, decided in 1911, by the Supreme Court of Virginia, it is said:

> "Nor can it be doubted that a contract procurred by threats inducing fear of destruction of one's property may be avoided on the ground of duress, there being nothing in such a case but the form of a contract wholly lacking the voluntary ascent of the party to be bound by it. To constitute duress it is sufficient if the will be constrained by the unlawful presentation of a choice between comparative evils as inconvenience and loss by the

detention of property, loss of property altogether, or compliance with an unconscionable demand."

It will be noted that these late cases do not approve the doctrine announced in the earlier cases to the effect that it is not duress to threaten to do what one has a lawful right to do—such as the bringing of criminal prosecutions and civil suits. The law now is that if such threats are made for the purpose of coercion, the threats are unlawful notwithstanding the right of the person making the threat to do the thing threatened, and duress results. But to say that it is not duress to threaten to do what one has a lawful right to do, is equivalent to saying that it is duress to threaten to do what one has no lawful right to do. In this case, The Electric Company had no lawful right to remove the machines and bring ruin to the business conducted by Gross. Gross had complied with the terms of the contract and had paid all the installments then due. True, he had paid no service charges, but the contract did not provide for the payment of service charges. The very object of the Electric Company in seeking a modification of the contract was to provide for the payment of such charges. The original contract did not provide for the payment of service charges, so that a failure to pay them did not constitute a violation of that contract. Gross had complied with the contract; and having done so he was entitled to the possession of the machines, so that it was unlawful and wrong for the Electric Company to take them away from him.

In determining whether the facts alleged are sufficient, it must be borne in mind that the Court is called upon to do this by a demurrer not by a motion for a directed verdict. In the case of Winget vs. Rockwood, 69 Fed. 2nd. 326, above referred to, the point was raised upon a motion to dismiss a bill in Equity, which is equivalent to a general demurrer. In reversing the order granting this motion, it is said:

> "This motion to dismiss, under Equity Rule 29 (28 USCA 723) is in the nature of a general demurrer. All the well-pleaded facts are, for the purpose of this motion, taken as true. A suit should not ordinarily be disposed of on such a motion unless it clearly appears from the allegations of the bill that it must ultimately, upon final hearing, be dismissed. To warrant such dismissal, it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated. This Court in Ansehl v. Puritan Pharmaceutical Co., 61 F. (2nd) 131, 133, speaking through Judge John B. Sanborn, said: "Since such a motion to dismiss has taken the place of a demurrer, it is elementary that it admits all material facts well pleaded in the complaint, that only defenses in point of law appearing upon the face of the complaint may be considered, and that, unless it is clear that, taking the allegations to be true, no cause of action in equity is stated, the motion should be denied."

> "That rule of procedure should be followed which will be most likely to result in justice between the parties, and, generally speaking, that result is more likely to be attained by leaving the merits of the cause to be disposed of after answer

and the submission of proof, than by attempting to deal with the merits on motion to dismiss the bill."

True, there is a difference between a demurrer to a bill in Equity and a demurrer to a counter-claim at law, but the difference is not such as to make the doctrine announced inapplicable—the reason given applies as well in one case as in the other.

The foregoing was written and printed before appellant's brief was served, and what follows is in the nature of a reply to what is said in appellant's brief upon the subject now being discussed.

Appellant discusses this matter on page 35 et seq. of its brief in Point Five, entitled, "The Court erroneously over-ruled plaintiff's demurrer to the Second and Fourth Counter-Claims for monies alleged to have been paid the plaintiff under duress."

It appears from the brief of appellant that appellant no longer insists that the facts stated in the counter-claim do not show duress; appellant now maintains that the demurrer should have been sustained because the facts set up in the counter-claim are not such as can form the basis of a counter-claim in this action under the Alaskan Code. In presenting this point appellant's counsel proceed upon the assumption that an action of replevin is always one that sounds in tort, and upon the further assumption that the action is based upon nothing except the refusal of the defendant

to deliver the replevined property upon demand. To support this proposition appellant relies upon the case of McGarger vs. Wiley, 229 Pacific, 665. In that case, however, the contract which serves as the foundation for the plaintiff's action was not set forth in the Complaint; in the case at Bar the contract is set forth and the case itself can be distinguished from the present case in the manner that two Kansas cases were distinguished by the Supreme Court in a case to which reference will presently be made.

While the Supreme Court has set this whole question at rest by holding against the doctrine announced by the Oregon Court, it is interesting to note in passing that the reasoning employed by the Supreme Court of Oregon was not sufficiently convincing to satisfy Judge Bean and Judge McBride, both of whom dissented. However, in view of the decision by the Supreme Court in the case of Clement vs. Field, 147 U.S. 467; 13 Sup. Ct. Rep. 358, it is unnecessary to inquire into the reasoning advanced by the Supreme Court of Oregon. In that case the Court was called upon to pass upon the identical question before the Supreme Court of Oregon —that is to say, of whether in an action of replevin brought to recover a portion of property held under a contract of sale the defendant could set up a counterclaim claiming damages for breach of warranty in the contract of sale, and the Court held that this could be done. In passing upon the question it is said:

"Another objection urged to the judgment of the court below is that the action in replevin was an action founded upon tort, and not upon contract; that a set-off can, under the Code of Kansas, only be pleaded in an action founded on contract; and that hence the defendants in the replevin suit in question could not legally plead a set-off of the damages caused by the breach of warranty.

"The supreme court of Kansas disposed of this contention in Gardner v. Risher, 35 Kan. 93, 10 Pac. Rep. 584, which, like the present, was a case wherein the plaintiff sought, by a writ of replevin, to enforce the provisions of a chattel mortgage, and the defendant set off against the notes secured by the mortgage certain damages incurred by reason of breaches of a contract. The court held that, as the plaintiff's claim was really founded on contract, the defendant could, notwithstanding that the form of the action was replevin, avail himself, by way of set-off, of damages caused by the failure of the other party to the chattel mortgage to comply with his contract.

"The later case of Kennett v. Ficket, 41 Kan. 211, 21 Pac. Rep. 93, is cited on behalf of plaintiff's in error as holding that a set-off cannot be pleaded as a defense in an action of replevin, because such an action is founded upon the tort or wrong of the defendant, and not upon contract. An examination of these two cases satisfies us that they are not irreconcilable. They were both suits in replevin, but in the earlier case the plaintiff's cause of action originated in the provisions of a chattel mortgage, and the suit in replevin was resorted to in pursuance of one of those provisions, and was regarded by the court as in substance founded on contract. The later case was founded on a wrongful taking by the defendant of property

of the plaintiff, and was therefore, in substance as well as form, an action ex delicto.

> "The replevin suit pleaded in answer in the present case was substantially a proceeding in enforcement of contract provisions, and therefore within the decision in Gardner v. Risher, 35 Kan. 93, 10 Pac. Rep. 584."

It will be noted that in the case at Bar the Complaint sets forth the original contracts, the supplemental contracts, and the facts constituting the alleged breach upon which the right to recover the property is based.

The Alaska statute, as is pointed out by counsel for appellant in his brief, contains two sections. The first provides:

> "First. A cause of action arising out of the contract or transaction set forth in the Complaint as the foundation of the plaintiff's claim."

Now the first question that arises is: Does this counter-claim, under which it is sought to recover these monies alleged to have been paid under duress, embrace a cause of action arising out of the contract or transaction set forth in the Complaint as the foundation of the plaintiff's claim? The contract is pleaded in the Complaint and the identical contract is pleaded in the counter-claim. Appellants claim the right to recover the equipment because certain service charges and certain charges for equipment were not paid in accordance with the contract. Appellee claims that these service

charges were not due under the contract and that he was compelled, by duress, to pay a considerable amount in the way of service charges which under the contract he had not agreed to pay; and that he was, under the contract, entitled to the possession of certain equipment of which appellant threatened to deprive him if these service charges were not paid; and that, because of the ruinous effect this would have on his business, he paid the service charges. This counter-claim, if well-founded, would, of course, defeat appellant's claim of something less than $100 for additional and spare parts, which, while it was not established by the evidence, was nevertheless included in the Complaint; and in addition to this it would result in reimbursing appellee for alleged service charges collected under duress. The whole matter forms but a single transaction which consists of a series of acts commencing with the signing of these contracts and terminating with the taking of the equipment under the writ of replevin.

The Courts, in construing this section of the Statute, are extremely liberal, not only because it prevents a multiplicity of suits, but also because liberality in its construction promotes the ends of justice—especially in such cases as the case at Bar. Here the appellant, a foreign corporation, comes to Alaska and invokes the aid of the Alaskan Court for the purpose of recovering a judgment against a resident of Alaska. Its business is not such as to require domestication, and the appointment of an agent upon whom service of

process can be made. If these matters required the bringing of an independent action, appellant could come to Alaska, litigate a portion of the differences existing between the parties, and then retire so as to compel the appellee to pursue it and bring action against it in the Courts at New York; obviously this would result in a denial of relief. It is just such situations as these that induce the Courts to adopt a liberal construction of these statutes, in order to compel parties to litigate all their differences in one action. Thus in the case of Advance Thresher Co. v. Klein, 133 N.W., 51, the Supreme Court of South Dakota held that in an action brought to recover a balance due from the sale of a threshing machine the defendant could set up a counter-claim for damages to his son resulting from the negligence of the agent of the threshing machine company. The facts, briefly stated, are these: The plaintiff had sold the defendant a threshing machine; it had agreed to keep the machine in repair, and defendant had agreed to help the plaintiff in making repairs. The plaintiff's agent, sent on one occasion to make repairs, called on defendant's boy to help him, and then suddenly started the machinery in such a way as to injure the boy. The boy, it was claimed, was helping as the representative of the defendant in connection with his agreement to help put the equipment in repair. The father had paid out a considerable sum as doctors' bills and had suffered other losses due to the boy's minority, and claimed a sum considerably in excess of the amount claimed due

on the threshing machine. The Court held that this counter-claim could be sustained under the statute. In passing upon that question it is said:

> "The principal contention of appellant is that the counter-claim is not connected in any manner with the contract sued upon, namely the notes; that the notes sued upon form the basis of the cause of action; and that the counterclaim must be connected with the contract sued on, and form a part of the transaction of the giving of the notes only. We are of the opinion that this contention is not tenable. The consideration of this question involves the construction of subdivision 1, Par. 127, Code Civ. Proc. A like provision is found in the Codes of many other states. In the case of Story & I. Commercial Co. v. Story, 100 Cal. 30, 34 Pac. 671, the court held that the 'transaction' comprehended within the meaning of this section of the Code is not limited to the facts set forth in the complaint, but includes the entire series of acts and mutual conduct of the parties in the business or proceeding between them which formed the basis of the agreement, and if plaintiff omits or fails to set forth in his complaint the entire transaction out of which the claim arose, defendant may supplement this omission by setting forth in his answer the omitted facts, so that the entire transaction may be before the court. The plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist on a judgment on that fact alone, if the fact is so connected with others that it forms only a portion of the transaction. See also 34 Cyc. 686 and 687. In the case at bar, the notes set out in the complaint constitute but a component part or portion of the entire transaction of the sale of the threshing machinery by plaintiff

to defendant. The contract of sale with all its mutual agreements and provisions, the acts of all the parties and their agents performed under and by virtue thereof in carrying out and performing the mutual provisions thereof, the repair of the engine, the assistance to be furnished in such repair on the part of the defendant, are all parts of one and the same transaction, just as much as the giving or the payment or nonpayment of the notes sued upon."

So, also, the Supreme Court of California in the case of Story & Isham Commercial Company vs. Story, 34 Pac. Page 671-673, referring to the matter under discussion says:

"One of the definitions given by the Century Dictionary to the term 'transaction,' is 'a matter or affair, either completed or in course of completion.' Mr. Pomeroy, in his treatise on Remedies and Remedial Rights, (section 774,) defines the term, as used in this section, to be 'that combination of acts and events, circumstances and defaults which, viewed in one aspect, results in the plaintiff's right of action, and, viewed in another aspect, results in the defendant's right of action,' and says, further: 'As these two opposing rights cannot be exactly the same, it follows that there may be, and generally must be, acts, facts, events, and defaults, in the transaction as a whole, which do not enter into each cause of action, but are confined to one of them alone.' See also, Bank v. Lee, 7 Abb. Pr. 372; Ritchie v. Hayward, 71 Mo. 560; Judah v. Trustees, 16 Ind. 60. Every transaction is more or less complex, consisting of various facts and acts done by the respective parties; and it frequently happens that one or more of these acts would, if viewed by itself, be such a violation of

duty as to give to the other a right of action, but the obligation thus created may be so counterbalanced by other matters growing out of the same transaction that no compensation ought to be made therefor. While the parties are carrying their agreement into execution, and mutual rights and obligations accrue by reason of the failure of either or both of them to comply strictly with its terms, neither party should have the right, so long as the agreement is in force, and is in process of execution, to recover the damage sustained by him from any breach of duty by the other, without at the same time satisfying any obligation against himself growing out of the same affair. In such a case the rights of the one are so dependent upon the rights of the other, that simple equity requires that the respective causes of action in behalf of each should be adjusted in a single suit. From an early day the tendency of judicial decisions has been to avoid circuity of action and multicity of suits, by permitting matters growing out of the same transaction, which might constitute an independent cause of action, to be given in evidence by way of defense; and the foregoing section of the Code of Civil Procedure is an additional legislative step in the direction of this judicial tendency. As a corollary therefrom, it follows that the form in which the plaintiff may set out his cause of action ought not to be conclusive upon the right of the defendant to set forth his counterclaim in his answer. The plaintiff is to set forth the facts which constitute his cause of action; but, if the other facts in the transaction are so connected with those set forth as to defeat their legal effect, the defendant is not precluded from setting them up by reason of the form which the plaintiff may have chosen for presenting his own side of the case. Pom. Rem. & Rem. Rights, Par. 772; Gordon

v. Bruner, 49 Mo. 570; Brady v. Brennan, 25 Minn. 210; Bitting v. Thaxton, 72 N. C. 549; Thompson v. Kessel, 30 N.Y. 338; Chandler v. Childs, 42 Mich. 128, 3 N.W. Rep. 297. It is for the purpose of enabling the court to render a judgment by which the rights of the parties may be finally determined in the same action, that the Code permits a defendant to set up in his answer any new matter arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim; and, if the plaintiff omits or fails to set forth in his complaint the entire transaction out of which his claim arose, the defendant may supplement this omission by setting forth in his answer the omitted facts, so that the entire transaction may be before the court. The plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist upon a judgment on this fact alone, if the fact is so connected with others that it forms only a portion of the transaction."

So also it is said by the Supreme Court of Colorado in the case of Bannerot v. McClure, 90 Pac. 70-71:

"In the enactment of the Code provisions, it was not intended to limit the defendant in his right to file a counter-claim to an action where the facts relied upon and alleged by him were identical with the facts relied upon and alleged by the plaintiff. The clear intention of the framers of the Code was that the court in one action should settle all matters in controversy relating to the contract or transaction which is the foundation of the suit. The word 'transaction' is much more comprehensive than the word 'contract.' Any cause of action, therefore, whatever its nature, arising out of the cause of action alleged in the complaint, or con-

> nected therewith, in favor of the defendant, and against the plaintiff, is a proper counterclaim. Any other construction would frequently defeat the ends of justice by preventing a full examination of the matter in controversy, where the rights of the parties were so dependent upon each other that they must necessarily be considered together to render a correct judgment."

In the case at bar, the right of the plaintiff to recover hinges on the construction of the contracts between the parties with relation to service charges; and the right of the defendant to recover on this particular contract hinges, at least to a very large extent, upon the same matters. All the dealings between the parties relating to these service charges, and relating to the equipment and the keeping of the equipment in appellee's theatre under the contracts, form part of a single transaction.

But the Alaska statute contains a second provision which reads as follows:

> "Second. In an action arising on contract any other cause of action arising also in contract and existing at the commencement of the action."

Now, under the Supreme Court decision above referred to, there can be no doubt that the present action, even though it is an action in replevin, is an action on contract. That being true, any other action also arising on contract may form the basis of a counterclaim.

Now it may be tort to extort money under duress,

but it does not follow that an action brought to recover monies so extorted is an action sounding in tort. When one extorts money from another, the law raises a promise to re-pay it, and when an action is brought to recover this money, the action may be brought on this implied promise; in other words, the victim from whom money has been extorted may sue in tort for damages or he may sue in contract to recover the money. At common-law, the form of action would be implied assumpsit, and in such cases it would be necessary to plead a fictitious promise to re-pay. But under the Code this is not necessary—under the Code it is necessary only to set up the facts—fictitious promises need no longer be averred.

Under this counterclaim the defendant does not seek to recover damages, but he seeks to recover the money paid—that is to say, he seeks to compel a repayment to him of the money taken from him—and the law raises the implied promise to re-pay. The action, therefore, is one sounding in contract; appellee has simply waived the tort and sued in assumpsit. This being true, the counterclaim is admissable as a cause of action arising on contract in a case where the action is founded on a contract. This is especially so because any recovery had on this counterclaim could be set off against monies claimed by appellant for spare parts or otherwise.

ASSIGNMENT NO. 7.

It is assigned as error that the court denied a motion to strike out Sec. D. of Paragraph 3 of the First and Fourth Affirmative Defenses, on the ground that the allegations are "irrelevant, incompetent, and immaterial."

The portion of the answer sought to be stricken reads as follows:

> "That the signature of the defendant to said paper writing, as it appears above, was obtained by duress, which consisted in this: At the time said signature was obtained, the defendant had not yet fully paid the plaintiff the full amount of Ten Thousand Five Hundred Dollars ($10,500.-00) to be paid it for installing and supplying the defendant with the equipment, and more fully described in the contract of March 28, 1929, but had fully complied with all the terms of said contract on his part and had already paid thereon all that was then due including the sum of $7,868.75 principal, and the interest thereon. That the plaintiff then and there threatened the defendant that unless he signed the paper writing above last set forth in full, in the manner thereon indicated, the plaintiff would immediately disconnect and remove the equipment supplied by it under the agreement of March 28, 1929, and deprive the defendant of the use thereof, causing him to lose all the monies theretofore paid, and leave him without equipment to operate his theatre. And the agent and employee of the plaintiff, by whom this threat was communicated to the defendant to-wit: J. A. Gage, told the defendant then and there, that the plaintiff had power to carry out said threat and could and would do so, under his contract of March

28, 1929. That the defendant was not sufficiently learned in the law to know his rights under the contract of March 28, 1929, and believed the statements so made to him by the representatives of plaintiff, in relation to such rights. And the defendant further believed that the plaintiff could and would disconnect and remove from his theatre, the equipment placed there under the contract of March 28, 1929 unless he complied with the request that he sign the paper writing, above referred to, in the manner indicated thereon. The defendant had a large sum, to-wit: many thousands, invested in a theatre building, and in the good-will of the business, which said good-will would be entirely destroyed if the equipment supplied him under the contract of March 28, 1929, were disconnected or removed. Especially so, since at that time, no other equipment to take its place, could be procurred by the defendant, all of which facts were well known to the plaintiff at the time, as well as to the defendant. That the defendant firmly belived that there was no way for him to save the large amount already paid, or to keep his business from being destroyed, except by complying with the demand of the plaintiff and its agent, that he sign the paper writing above referred to and so believing, and because of said threats, and not otherwise, the defendant placed his signature upon said writing at the point indicated upon said writing, for the sole purpose of protecting himself and his property against the unlawful threats made by the plaintiff as aforesaid."

The Compiled Laws of Alaska, 1933, Section 3437, provide in part as follows:

> "If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of the adverse party."

It requires no argument to show that the defense of duress is not irrelevant or redundant matter in a case such as this. The defense cannot, therefore, be stricken out on a motion under the Alaska statute. If sufficient facts are not pleaded, the point can only be raised by demurrer. But, a glance at the facts pleaded, in the light of what has been said in discussing the preceding assignment upon the law of duress, will disclose that the facts are sufficient.

Since the foregoing was written and printed appellant's Brief was served, and from it, it is made to appear that appellant no longer contends that the defense of duress should be stricken from the answer because it is not properly pleaded. Counsel for appellant now takes the position that this defense should have been stricken because it was immaterial, for the reason that it makes no difference whether the contracts of September 4, 1929, were valid contracts or not, in that the obligation to pay service charges rests not upon the contracts of September 4 but upon the original contracts; the contention of counsel being that these contracts of September 4 were mere letters and not contracts at all, so that they didn't require the signature of appellee, and that this being so, it is wholly immaterial whether appellee signed them or not.

Now, we do not concede even for the purpose of argument that counsel's position is correct, but we do contend that, even though it were correct, the Court did not err in over-ruling the motion.

Paragraph Two of the complaint (Pr. Rec. P. 2) reads in part as follows:

> "* * * Plaintiff and defendant heretofore and on or about March 28, 1929, entered into a certain written agreement, and thereafter and on or about September 4, 1929, mutually modified said agreement, in which agreement, as so modified, they mutually agreed, among other things * * *."

The reply (Pr. Rec. PP. 92-93) reads in part as follows:

> "That on or about March 28, 1929, the parties hereto made and entered into that certain agreement bearing that date, a substantial copy of which marked Exhibit A, is attached to said Amendment Answer; that at the time of the execution of said contract said parties mutually agreed that the weekly charge for services to be rendered thereunder by plaintiff for periodical inspections had not been established, and that the amount thereof should be later determined and mutually agreed upon by the parties hereto; that thereafter and under date of September 4, 1929, in pursuance to said agreement and for the purpose of modifying thereby said previous agreement of March 28, 1929, and to establish the weekly charge that plaintiff should make and which defendant should pay plaintiff for the periodical service to be rendered by plaintiff under the aforesaid contract of March 28, 1929, the parties hereto mutually made and entered into that certain agreement, a substantial copy whereof, marked Exhibit 2, is set forth in defendant's said Amended Answer; that said last mentioned agreement was actually executed by defendant in person on or about December 30, 1929."
>
> (Pr. Rec. P.P. 92-93).

Now it doesn't seem altogether right that appellant should attempt to convict the Trial Court of error because the Trial Judge adopted the view of appellant in accordance with which appellant holds out these documents of September 4, 1929, as contracts. Furthermore, even at this time counsel does not appear to agree with himself upon this point. In discussing Point III, (P. 26 Appellant's Brief) counsel complains bitterly because the Court gave an instruction under which these documents of September 4 might not be held valid as contracts. If it be immaterial whether they are contracts or not, why all this complaint? If counsel be right in his present contention, the instruction complained of under Point III. was certainly immaterial, and if erroneous, the error was harmless.

But counsel is not correct in the assumption that he now makes, to the effect that these alleged contracts of September 4 are immaterial in that the appellee's obligation rests upon the original contract and is in no way affected by the alleged supplemental contracts. Obviously, appellant did not take that view when the complaint was filed, for, according to its allegations above quoted, the obligations of appellee are made to rest upon both contracts—the original contract as modified by the supplemental contracts.

In the reply on page 93 it is said:

> "That at the time of the execution of said contract (meaning the original contract) said parties

> mutually agreed that the weekly charge for the services to be rendered thereunder by plaintiff for periodical inspections had not been established, and that the amount thereof should be later determined and mutually agreed upon by the parties hereto * * *."
>
> (Pr. Rec. P. 93).

It is then averred in the portion of the reply previously quoted, that the contracts of September 4 were entered into for the purpose of establishing a weekly charge to be paid. At the time of the trial, therefore, appellant did not believe that the original contracts provided for the payment of any service charges; and before the contracts were executed, appellant took the view that it was unwilling to execute a contract under which service charges were to be fixed, because of its inability to tell what the cost of such service charges would be in Alaska.

Appellant's witness Anderson, who acted as appellant's agent in executing the original contracts, and who also signed the alleged contracts of September 4 in his own name as comptroller, testified:

> "In view of the uncertain situation with respect to Alaska, the plaintiff company had no knowledge at the time of the negotiation of the contracts, exhibits 1 and 3, of the probable cost of furnishing engineering service for the theatres in that territory. It was consequently unwilling to enter into a contract which would fix the amount of its compensation for the rendering of such service when the cost of rendering it was still an un-

known quantity and was willing only to enter into such contract upon the understanding that the weekly charge for servicing would be made the subject of a subsequent agreement between the plaintiff company and the exhibitor. Accordingly, when the contracts, Exhibits 1 and 3, were executed, the amount of the weekly charge for servicing the equipment was left blank and this amount was later agreed to by the parties to the contract, Exhibit 7, through the medium of the subsequent agreement, Exhibit 2, and to the contract, Exhibit 3, through the medium of the subsequent agreement, Exhibit 4."

(Pr. Rec. PP. 169-170).

Immediately after the original contracts had been executed by appellant, and before appellee had received his copy, appellant's agent Gage told the appellee, in the presence of witness Cawthorn, that the contracts had been executed without service charges and without service, and that appellee would have to supply his own service.

(Ev. Gross, Pr. Rec. P. 317-8; Ev. Cawthorn, Pr. Rec. P. 476).

Neither Gage nor anyone else denies this conversation, and the appellee Gross thereupon made provision to service the equipment himself. Sometime later Vice President Wilcox made the statement, in the presence of Gross and Louis Lemieux, "That Gross has no service with us in Alaska." (Ev. Gross, Pr. Rec. P. 319; Ev. Louis Lemieux, Pr. Rec. P. 802).

While Wilcox denies having made this statement, the circumstances are such that he must have forgotten about it.

No bills for service charges were ever rendered appellee until after September 4, 1929; this notwithstanding the fact that the efficiency and vigilance of the Credit Department of the appellant is firmly established by the evidence in the Record. In the meantime, also, appellant tried to sell appellee extra equipment and supply him with electric soldering irons, for all of which appellee would have no use if appellant was to service the equipment. Then on top of all this, appellant resorted to coercive measures to compel appellee to sign the alleged agreements of September 4. If appellant's present position be correct, appellant's Comptroller Anderson, its agent Gage, its Vice President Wilcox, appellee, and everyone else who had anything to do with the negotiations for, or the execution of, the original contracts, misinterpreted them and did what they didn't intend to do; and appellant used coercive measures to compel appellee to sign a supplemental contract, which was wholly unnecessary and which conferred no benefits upon it even though valid. This evidence not only goes to show what interpretation the parties themselves placed on the original contracts, but it shows another and very important thing, and that is that it was not their intention that Paragraph 6 should be executed as part of the original contract at all, but that it was their intention to leave it out, and that for

that reason they left this paragraph incomplete by not filling in the blanks—and that is exactly the effect that the law gives to paragraph 6. The authorities upon this point have already been discussed on page 65 et. seq. of this Brief.

Counsel, in his Brief, maintains that the first part of Section 6 imposes the obligation to pay upon appellee and that the other portion in which the blanks occur is merely meaningless as though it were so much surplusage. The first part of Section 6, which counsel claims imposes the obligation, follows:

> "In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term, shall be payable on the Saturday next succeeding the 'Service Day' and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products regular schedule of such charges as from time to time established."
>
> (Pr. Rec. P. 177).

Here counsel quits as though that were all there were in Section 6. He maintains that under this provision the appellee agrees to pay in accordance with whatever schedule the appellant at any time establishes; but the difficulty with counsel's contention is that the portion quoted is not the whole of Section 6. The language quoted is followed by the following:

> "Under Products' present schedule, the service and inspection payment shall be $——— per week, which charge shall not be exceeded during the first two years of the period of said license and thereafter for the balance of the term of said license shall not exceed the sum of $——— per week."
>
> (Pr. Rec. P. 177).

Counsel maintains that this portion of the section was rendered meaningless by not filling in the blanks, and that the effect of not filling in the blanks is simply this: That while this provision which contains the blank places a limitation upon the amount that can be charged by Products, the failure to fill in the blanks makes this provision meaningless so as to wipe out this limitation and give Products a right to charge whatever it pleases —in other words it takes off the limit. This would indeed make the contract a very remarkable document, under which one party agrees to pay whatever the other party may demand. But the decisions of the Courts do not permit the adoption of any such construction. In the case of Church vs. Nobel, 24 Ill. 292, discussed on page 65 of this Brief, the Supreme Court of Illinois held that blank dollars means no dollars, and that an agreement to pay blank dollars was an agreement to pay no dollars. Applying that decision to the facts before us, paragraph 6 of the Contract is made to read:

> "The amount of such payment shall be in accordance with Products' regular schedule of such charges as from time to time established. Under Products' present schedule, the service and in-

> spection payment shall be 'No Dollars' per week, which charge shall not be exceeded during the first two years of the period of said license and thereafter for the balance of the term of said license shall not exceed the sum of 'No Dollars' per week."
>
> (Pr. Rec. P. 177).

And this decision of the Supreme Court of Illinois is in exact accord with the other decisions cited upon this point at page 66 of this Brief.

The effect of these decisions is simply to make the whole of section 6 inoperative. This contract was made upon a blank form supplied by appellant. The provisions of paragraph 6 didn't fit the case. The parties didn't print another blank form, but simply used the one they had and left the blanks blank with the obvious purpose of making the whole paragraph inoperative. According to the testimony of the Witness Anderson, appellant was unwilling to sign a contract with these blanks filled in. There was no way to tell what the cost of the service would be, and subsequent developments simply showed that the service couldn't be rendered at all. It was the evident intention to leave paragraph 6 inoperative, just as though it had never been, and this is also the intention that the Courts impute to the parties in such cases, as was said in Lore vs. Smith, 133 So. 214, to which reference has previously been made: "The omission to fill in the blanks in the future advance clause of the deed of trust indicates an intention that the clause

should not become operative." Any other interpretation would lead to ridiculous conclusions, as the interpretation placed upon the contract by counsel for appellant at the present time would place upon appellee burdens that no rational man would assume. It may be true that a Court of law cannot relieve a party from the performance of obligations that are harsh and burdensome, but it is also true that a Court will not adopt a construction that will lead to the imposition of harsh and unusual burdens and that will lead to ridiculous conclusions, if the contract is open to another construction that is both fair and rational.

But, what is far more significant, the construction contended for by appellant would make the provisions of paragraph 6 void for uncertainty. There would be no way to tell the amount to be paid from the contract.

But, asserts counsel, the fact that appellant agrees under the provisions of paragraph 4 to make periodical inspections and minor adjustments, compels the conclusion that these periodical inspections and minor adjustments were to be paid for under the provisions of paragraph 6. But counsel fails to call the Court's attention to a provision in paragraph 8 which provides that the periodical inspection and minor adjustment service is not to be paid for at all. This matter was fully discussed on page 71 of this Brief and we will not therefore repeat what was there said. Counsel also overlooks the fact that section 6 provides for a service charge and not for a charge for periodical inspection and minor

adjustments. True, counsel elsewhere contends that these are one and the same thing, but it is alleged in the Answer that when employed by those engaged in the motion picture business the phrase "periodical inspection and minor adjustments" means the periodical inspection of, and the making of minor adjustments to, machinery or equipment that is in a state of repair; while the term "service" means the repair of equipment that is out of repair. At the trial evidence was offered to sustain these allegations, and the evidence upon the subject is all one way. Appellant produced no witnesses to deny the fact that this distinction exists, and that the meaning of inspection and minor adjustments is one thing, and the rendition of service quite another thing. The Witness Wilcox, appellant's Vice President, took the stand and testified—gave a definition of service—but he did not deny that service was one thing and the making of inspections and minor adjustments quite another thing. He left the testimony of appellee's witnesses upon this subject without contradiction. This subject was discussed by us on page 67 et. seq. of this Brief, so that it is not necessary to inquire into it any further at this time. It all goes to show that it was the intention of the parties to leave this entire section 6 inoperative so that appellant would not be obliged to render service, and appellee would not be obliged to pay for service, just as Gage told Gross after the contracts had been signed, and just as Wilcox told Taylor in the presence of Gross and Lemieux; and as has already been

pointed out, this is in exact accord with the decisions of the Courts. It may be added that if there were any doubt upon the subject that doubt would have to be resolved in favor of the apellee for the reason that the printed form was furnished by the appellant. The blanks left in the printed form were originally left there by the appellant, the contract was simply sent to appellee with no option except to take it or leave it. In such cases the contract must be construed most strictly against the party preparing it and furnishing the blanks. Upon this point all authorities are agreed.

In considering the effect of the blanks left in paragraph 6, it must be borne in mind that under the contract there are no agreements or understandings either express or implied not expressly set forth in the contract itself. This is so because of the express provisions contained in paragraph 20, which provides:

> "The parties hereto expressly stipulate that this agreement as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof, and that there is no other understanding, agreement or representation, express or implied, in any way limiting, extending, defining or otherwise relating to the provisions hereof or any of the matters to which the present agreement relates."
>
> (Pr. Rec. P. 186).

ASSIGNMENT NO. 8.

It is assigned as error that the court refused to instruct the jury as follows:

"You are instructed that under Section 8 of each of the contracts of March 28, 1929, plaintiff's exhibits Nos. 1 and 3, the defendant agreed to pay to plaintiff its list installation charges as from time to time established for any additional equipment and spare or renewal parts, furnished or supplied by plaintiff, upon delivery thereof and to pay the transportation charges thereon.

"You are instructed that the evidence in this case shows that the plaintiff pursuant to that section of those contracts furnished and supplied defendant at his Juneau theatre with the additional equipment and spare or renewal parts described in the first cause of action in plaintiff's amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of $29.09, and furnished and supplied to defendant at his Ketchikan theatre additional equipment and spare or renewal parts described in the second cause of action mentioned in plaintiff's amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of $61.92, and that no evidence has been offered by defendant tending to show that those amounts were paid by him to plaintiff at the time of the commencement of this action or since whereas plaintiff offered evidence that said amounts had not been paid and that the same were due at the time of the commencement of this action."

(P. R. Page 133-134).

An exception was taken, but no grounds of exception were stated. (Pr. Rec. P. 978).

Section 8 of the contract provides in part: "The exhibitor agrees to pay *** for any additional equip-

ment *** upon delivery thereof." (Pr. R. P. 178). There is no evidence in the record that the parts referred to in this instruction were ever delivered. Hence, there is no evidence to show that anything was due on account thereof. But there is abundant evidence to show that appellee had over-paid appellant to the extent of many thousand dollars under duress and otherwise. Hence, to give this instruction would be to instruct all of appelle's counter-claims out of the case. That there were large sums due the appellee will be made to appear in connection with the discussion of other assignments so that the matter need not be gone into here.

On page 22 of appellant's brief it is said:

> "On the trial, plaintiff proved by uncontradicted, documentary evidence that it furnished additional equipment and parts to the defendant; that the defendant received, and receipted for, this equipment; and that there was due and unpaid, when this action was begun, $29.09 for such equipment furnished at Juneau and $61.92 for such equipment furnished at Ketchikan."

Counsel is mistaken in this. Neither the documentary evidence nor any other kind of evidence proves what counsel says was established. The fact that these small amounts—$29.09 for Juneau and $61.92 for Ketchikan—were due and owing, is denied by the Answer. The only evidence offered at the trial by the appellant upon this subject was the evidence of one Pearsoll. He testified that appellee was charged with these

amounts on appellant's books. He also testified on page 299 of the Record as follows:

> "Plaintiff has the original orders for that spare parts and additional equipment and his receipts therefor, signed by defendant or his manager, which I now produce."

The Record then proceeds:

> "Whereupon said orders and receipts were received in evidence marked Plaintiff's Exhibit No. 26."

Now, the particular items for which suit was brought are described in the Complaint. Those furnished to the Juneau theatre are referred to on the bottom of page 6 of the transcript and on the top of page 7 as having been furnished between May 20, 1930, and February 17, 1931; and those furnished to the Ketchikan theatre are described on page 13 of the transcript as having been furnished between April 7, 1930, and February 18, 1931.

Turning now to Exhibit 26 and 27: they contain all the receipts signed by appellee, or his agents, for merchandise delivered; and, according to the testimony of Pearsoll, the receipts in these exhibits cover all the merchandise that was delivered. We find that exhibit 26 contains no receipts signed by appellee Gross or anyone else, although exhibit 27 does contain such receipts; but each and every one of these receipts were signed either by Gross, or his agent Charles Tuckett, or Louis Lemieux, prior to April, 1930, so that not one

of these receipts was a receipt for any of the merchandise sued for in the Complaint.

On the bottom of page 307 is one of two receipts for goods shipped that comes within the dates mentioned in the Complaint. It reads as follows:

> "Order dated 7-16-30 shipped to Coliseum Theatre, Juneau, receipted by J. S. Briggs, viz."

Now, while this receipt was signed, it wasn't signed by the appellee or any of his agents. J. S. Briggs was the agent of appellant: he was the man who was head of the Seattle Service Department, residing at Seattle, at that time, and had nothing to do with appellee whatsoever. He testified in this case as one of appellant's witnesses and supplies us with all this information.

(Ev. Briggs, Pr. Rec. P. 912).

On page 308 of the transcript is another order dated 7-16-30, shipped to Coliseum Theatre, Ketchikan, receipted by J. S. Briggs. This order also somes within the time, but this is the same J. S. Briggs who signed the receipt just previously referred to—he was the agent of appellant, and not the agent of appellee, as previously stated.

If these receipts, signed by Briggs, prove anything, they simply prove that these shipments were shipped from Los Angeles to Seattle, to Briggs, and that they are still at Seattle and never went any further, so that

there is not only a failure of proof that these items were delivered to appellee, but the receipts themselves show that they were never delivered to appellee but to Briggs.

But this liability exists, if it exists at all, under the provisions of par. 8 of the contract, which provides that what appellee agrees to pay to appellant for the articles of merchandise referred to is appellant's "list of installation charges as from time to time established." It is not only impossible to tell from the contract what the amount to be paid shall be, but the whole matter is left to the will of appellant—no one can tell what the price will be until appellant has expressed its will by establishing, from time to time, its lists of prices. Obviously, this provision is void for uncertainty. If merchandise were actually delivered under this provision, its reasonable value could be recovered on a quantum meruit; but a failure to pay such reasonable value would not work a forfeiture of appellee's rights under the original contract.

On page 24 counsel quotes the instruction that the Court did give with reference to the amounts due for additional and spare parts. He then criticises this instruction as being obscure and confusing, but when the instruction was given, counsel didn't object to it as being either obscure or confusing—no exception was taken to it. That being so, it became the law of the case, so that no further instruction upon that subject was

either necessary or proper, and the Court's action in refusing to give a further instruction was not error.

We do not wish to be understood as conceding that the instruction given by the Court, was open to the objection now made by counsel for the first time; we merely wish to be understood as saying that if counsel wished to make that objection he should have made it at the time the instruction was given, and that not having made it then, he cannot make it now. But as we have already pointed out, there was not only a failure of proof on the part of the appellant in that it didn't prove that these articles were ever delivered to the apepllee, but the appellee had also introduced evidence that he made over-payments in the way of monies paid under duress which were then in the possession of the plaintiff, and which, of course, would be a set off to any claim for spare parts or other merchandise.

ASSIGNMENT NO. 9.

Assignment of error No. 9 sets forth certain portions of instruction No. 8, leaving out the most material portions which explain and qualify the language excepted to.

> The exception reads: "Also take exception to instruction number 8, Your Honor, particularly upon the ground we claim that is not a statement of the true measure of damages and no profits can be recoverable in this case in any event, and furthermore, that the defendant can not recover in

this action upon his counterclaims in any event, and further, that portion concerning the purchase of new equipment, found on page 27 (last par.) of that particular instruction, which we contend is not an element of damages in this case. ***The same exception to instruction 10 as we took to instruction No. 8." (Pr. Rec. P. 1028).

The language employed in stating the exception is too general and does not point out any particular in which the court is alleged to have erred. It is said: "We claim that is not a true statement of the measure of damages." But the exception does not state what the true measure of damages is or in what particular the statement made by the court is in error. It is also to be noted that the portion excepted to does not contain a statement of the measure of damages at all—that is dealt with in a portion of the instruction not accepted to. It is there said, "and that no profits can be recoverable in this case in any event." Now, no one will contend that anticipated profits can not be recovered in a proper case; and this exception does not inform the court why this is not a proper case. The exception then proceeds: "and furthermore, that the defendant cannot recover in this action upon his counter-claims in any event." But it is not stated why the defendant cannot recover. To say that a party cannot recover, is not to point out a specific error in instructions. The exception continues, "and further that portion concerning the purchase of new equipment found on page

27 (last Par.) of the particular instruction, which we contend is not an element of damages in this case." Here is it said that the appellate contends that this is not an element of damages in this case, but it is not pointed out upon what the contention is based. The court's attention is not directed to anything except a contention of counsel in general and sweeping terms.

The exception does not bring up for discussion any specific law point. The only possible way in which it can be met, is to enter upon a more or less general discussion of the law applicable to the recovery of anticipated profits.

The leading federal case upon this question, is the case of Central Coal & Coke Co. vs. Hartman, 111 Fed. 96. This was an action for damages to business. After holding that, as a general rule, profits cannot be received, Judge Sanborn, speaking for the Court, says:

> "There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business and the monthly and yearly income he derives from it for a long time before, and for the time during

the interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff had lost. One, however, who would avail himself of this exception to the general rule, must bring his proof within the reason which warrants the exception. He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deducted." 1 Sedg. Dam. P. 183; Red vs. City Council, 25 Ga. 386; Kenny vs. Collier, 79 Ga. 743, 8 S.E. 58; Greene vs. Williams 45 Ill. 206; Hair vs. Barnes, 26 Ill. App. 580; Morey vs. Light Company, 38 N.Y. Sup. Ct. 185. And one who seeks to recover for the loss of the anticipated profits of an established business without proof of the expenses and income of the business for a reasonable length of time before as well as during the interruption is in no better situation. In the absence of such proof, the profits he claims remain speculative, remote, uncertain,

and incapable of recovery. In Goebel vs. Hough, 26. Minn., 252, 258, N. W. 847, 848, the Supreme Court of Minnesota said: 'When a regular and established business, the value of which may be ascertained, has been wrongully interrupted, the true general rule for compensating the party injured is to ascertain how much less valuable the business was by reason of the interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such values cannot be ascertained without showing what the usual profits are."

"The truth is that proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business. Goebel vs. Hough, 26 Minn. 252, 256, 2 N.W. 847; Chapman vs. Kirby, 49 Ill. 211, 219; I Sedg. Dam. 182; Ingram vs. Lawson, 6 Bing. N.C. 212; Shafer vs. Wilson, 44 Md. 268, 278."

And referring to the character of proof that should be made, it is said:

"Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judg-

ment than the conjectures of the jury without facts. The plaintiff in this case had his bank account at his command, which would certainly have given him some indication of the volume of his business before and after the interruption of which he complained. He had his ledger, in which he testified that he had entered the charges of the coal which he had sold on credit. The bank account and the ledger account together, if properly kept, would have given at least an approximate statement of the value of the coal which he handled, because one would have shown his cash receipts, the other his charges for coal sold on credit, and the payments he received for that coal, and a careful comparison of the two would have enabled any intelligent bookkeeper to at least approximate the value of his business. These books were not produced. The indispensable facts to warrant a recovery of the expected profits of an established business were not established; there was no evidence of the amount of capital in the business; of its expenses or of its income, either before or after its interruption."

So, also, in the case of Homestead Co. vs. Des Moines Electric Co., 248 Fed. 439-445, the same judge says:

"It is true that the general rule is that the expected profits of a commercial business are generally too remote, speculative, and uncertain to sustain a judgment for their loss. But there is an exception to this rule, to the effect that the loss of profits from the destruction, interruption, or depression of an established business may be recovered, if the plaintiff makes it reasonably certain

by competent proof what the amount of his loss actually was. It is true that the proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts, from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." Central Coal & Coke Co. vs. Hartman, 111 Fed. 96, 98, 99, 102; 49 C. C. A. 244, 246, 247, 250. It is not, however, necessary in pleading such profits to set forth all the details of the requisite proof."

The rule permitting recovery in this class of cases is stated with clearness in the case of Yates vs. Whyel Cokè Co. 221 Fed. 603. This was an action for damages for breach of contract resulting from a failure to deliver coke of the quality specified in the contract. The opinion reads in part as follows: "It is well settled that, where a regular and established business is wrongfully injured, interrupted, or destroyed, its owner may recover the damages sustained, providing he makes it appear that his business was of that character and that it had been successfully conducted for such length of time that his profits from it are reasonably ascertainable—the correct rule for compensating the injured party being the ascertainment of how much less valuable the business was by reason of the interruption and the allowance of that amount of damages. As the value of such a business depends mainly on the ordinary profits derived from it, such value cannot be determined without showing what the usual profits are. Central Coal & Coke Co. vs. Hartman, 111 Fed. 96,

98, 99, 46 C.C.A. 244 (C.C.A. 8); Alison vs. Chandler, 11 Mich. 542, 558; 13 Cyc. 59."

In a recent case, Lumber Co. vs. Creamery, 18 Fed. (2nd.) 858, the Circuit Court of Appeals for the Ninth Circuit held that damages could be recovered for injury to the business of a creamery company.

The case of Wellington vs. Spencer, 132 Pac. 675, was an action to recover damages for the destruction of a hotel business as the result of a wrongful attachment. The Court say:

> "The next question presented is whether the closing of the hotel building and consequent destruction of plaintiff's business was an element of damage to which he was entitled. The decisions upon this question are not uniform. A number of cases hold that no recovery can be had for loss of profits. However, not many cases can be found supporting that proposition. A number of cases hold that no recovery for loss of profits occasioned by the destruction of business can be had unless the act which occasioned the loss was malicious. Kaufman vs. Armstrong, 74 Tex. 65, 11 S.W. 1048; Bucki Lumber Co. vs. Maryland Fidelity Co., 109 Fed. 393; 48 C.C.A. 436; Union Nat'l. Bank vs. Cross, 100 Wis. 174, 75 N.W. 992; Braundorf vs. Fellner, 76 Wis. 1, 45, N.W. 97. But a large number of well-considered cases hold that when the loss of profits is the proximate result of the unlawful act, and the amount is capable of proof to a reasonable certainty, the earnings of a business may be taken into consideration when assessing damages for the unlawful act. Smith vs. Eubanks, 72 Ga. 280; Stewart vs. Lanier House

Co. 75 Ga. 582; Chapman vs. Kirby, 49 Ill. 211; Lawrence vs. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Dobbins vs. Duquid 65 Ill. 464; Terre Haute vs. Hudnut, 112 Ind. 542, 13 N.E. 686; Moore vs. Schultz, 31 Md. 418; Lawson vs. Price, 45 Md. 123; Evans vs. Murphy, 87 Md. 498, 40 Atl. 109; Goebel vs. Hough, 26 Minn. 252, 2 N.W. 163. See Sedgwick on Damages (Par. 173 et seq.)."

"The reason that prospective profits cannot be considered in estimating damages is that they are uncertain and not capable of sufficiently definite proof to justify a verdict or decision as to their amount. The law does require reasonable certainty, but not more than that. In personal injury cases, where there is permanent disability, the juries are always permitted to consider the plaintiff's probable life duration, and this, in the face of the fact that we are constantly taught that life is uncertain and that no one is justified in presuming that he will live any particular length of time. The jury is simply permitted to use the best basis possible for estimating the damages. Why should not the same rule apply in cases where a business has been broken up or interrupted? Of course, juries will not be permitted to merely speculate as to damages. Where the plaintiff has just made his arrangements to begin business, and he is prevented from beginning either by tort or a breach of contract, or where the injury is to a particular subject-matter, profits of which are uncertain, evidence as to expected profits must be excluded from the jury because of the uncertainty. There is as much reason to believe that there will be no profits, as to believe that there will be profits, but no such argument can be made against proving a usual profit of an established business. In this case the plaintiff, according to his testimony, had an established business, and was earning a profit

in the business, and had been doing that for a sufficient length of time that evidence as to prospective profits was not entirely speculative. Men who have been engaged in business calculate with a reasonable certainty the income from their business, make their plans to live accordingly and the value of such business is not such a matter of speculation as to exclude evidence from the jury."

In the case of Allison vs. Chandler, 11 Mich. 542, the Court, speaking of Christiancy, J., said:

"This business must not be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable * * * for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct, and immediate consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of one thousand dollars per year, and he is ousted from the premises and this business is entirely broken up for the balance of the time; can he be allowed to recover nothing but six cents damages for his loss? To ask such question is to answer it."

In Lambert vs. Haskell, 80 Cal. 611, 22 Pac. 327, the Court said:

"It is objected that the respondent was allowed to recover damages for the profits which he would

have made had he not been prevented by the injunction from carrying on his business. We think that this was proper. It must be true that where a party is wrongfully prevented by injunction from carrying on a profitable and established business he can recover damages therefor. And if the profits which he would have made are not to be allowed, what damages is he to recover? Would it be adequate compensation to reimburse him merely for his expenditures, and for the losses which he might sustain from being prevented from fulfilling existing engagements, and the depreciation of his stock in trade? If this were true, there would be a very convenient way of getting rid of a business rival. A business might be destroyed by a preliminary injunction before the truth of the allegations upon which it was obtained could be inquired into. The best considered cases agree that, where an established business is wrongully injured or destroyed, the owner of the business can recover the damages sustained thereby, and that upon this question evidence of the profits which he was actually making is admissable. Terre Haute vs. Hudnit, 120 Ind. 550 et seq., (13 N.E. 686); Chapman vs. Kirby, 49 Ill. 219; Simmons vs. Brown, 5 R.I. 299, 73 Am. Dec. 66; Gibston vs. Fischer, 68 Iowa, 30 (25 N.W. 914); Goebel vs. Hough, 26 Minn. 256 (2 N.W. 163); Shafer vs. Wilson, 44 Md. 268."

In the case of Chapman vs. Kirby, 49 Ill. 211, the Court said:

"As to the estimate of losses sustained by the breaking up of his established business, there would seem to be no well-founded objection. We all know that in many, if not all, professions and call-

ings, years of effort, skill, and toil are necessary to establishing a profitable business, and that when established it is worth more than capital. Can it then be said that a party deprived of it has no remedy; and can recover nothing for its loss, when produced by another?"

"It has long been well recognized law that when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade, or other causes, they would have been less? Nor can we expect that in actions of this character, the precise extent of the damages can be shown by demonstration. But by this means they can be ascertained, with a reasonable degree of certainty."

The question was decided by the Supreme Court of the Territory in the case of Tootle vs. Kent, 12 Okl. 674, 73 Pac. 310.

In the case of Ft. Smith & Western R. Co. vs. Williams, 30 Okl. 726, 121 Pac. 275, 40 L.R.A. (N.S.) 494, the general doctrine with reference to proving expected profits as an element of damages was considered, and a large number of authorities cited and discussed. It

was held in that case where a railroad company undertook to deliver a rotary swing, sometimes called a "merry-go-round," to be used at a picnic, knowing the purpose for which it was to be used, upon its failure to deliver same, it was liable for the profit that would have been made by the use of the swing during the progress of the picnic; and that opinion clearly points out that the reason evidence as to anticipated profits is excluded in many cases is because they are incapable of being proved with a reasonable degree of certainty."

In this case it was also held that damages to the property and the business constituted but one cause of action.

In the case of Denver vs. Bowen, 184 Pac. 357, the Supreme Court of Colorado say:

> "Loss of business is a very common element of damage in many kinds of cases, and the fact that such loss cannot be exactly determined is no reason why the wrong should go unredressed or the wrongdoer escape entirely at the expense of his victim."

The case of Sommer vs. Yakima, 26 Pac. (2nd.) 92, is a very recent case, decided by the Supreme Court of Washington. The action was for the destruction of a garage business. The Court say:

> "Appellant's second contention is that there was not sufficient evidence to justify an award to respondents Sommer for the destruction of their bus-

iness. The Sommers had a lease on the garage, which had two years to run. They had conducted their business profitably in the same premises for fifteen years. The owners of the building which had been burned did not replace it, and there was no other available location that the Sommers could obtain. So far as they were concerned, the business which they had established was totally destroyed, and we think that it cannot be forcefully argued that the destruction of their business was any less the result of the fire, and the wrong committed, than was the loss of the building itself or its contents. The damages were neither remote nor conjectural. (Seeley vs. Peabody, 139 Wash. 382, 247 Pac. 471.) The amount allowed by the jury for this item was $2,204.00. This amount was within the proof offered, and it cannot be said as a matter of law that the verdict in this respect is not supported by the evidence."

In order to determine whether the Court followed the law as laid down in the foregoing cases, in giving Instruction No. 8, it becomes necessary to consider the whole instruction—the portions excepted to, standing by themselves, are so fragmentary and incomplete that they do not convey any meaning unless read in connection with what follows and preceeds. The instruction, as given by the Court, follows:

"I further instruct you, Ladies and Gentlemen of the Jury, that the defendant set up two Counter-Claims to each of the Causes of Action stated in the plaintiff's complaint; and referring to the first Counter-Claim set up by the defendant to the plaintiff's first Cause of Action, I instruct you that if

you find from the evidence under my instructions that the defendant complied with all the terms of the contract, Exhibit "1" and paid to the plaintiff the full sum of Ten Thousand Five Hundred Dollars as principal, and paid the interest thereon in accordance with the provisions of said contract; and in all other respects complied with the terms of said contract to be kept and performed on his part; and that the alleged agreements bearing date of September 4, 1929, received in evidence as Exhibit No. "2", are invalid under the evidence and under my instructions; or that if valid the plaintiff has failed in any way to comply with the terms thereof; and further that the plaintiff cannot recover against the defendant under the first Cause of Action stated in the complaint; then I instruct you that the defendant has a right to recover a judgment against the plaintiff because of the first Claim set up in defendant's answer in such sum or sums as you may find he may be entitled to under these instructions.

I further instruct you that if you find that the defendant is entitled to recover from the plaintiff on his first Counter-Claim under the evidence and under my instructions, then I instruct you that he can recover: (1) The rental value of the equipment taken out of his Coliseum Theatre at Juneau for an unexpired portion of the lease embodied in his contract of March 28, 1929 *and in this connection I instruct you that it is admitted by the plaintiff that the rental value of the equipment so taken out is* $1,050.00 *per year, and that the amount to be fixed by you, if you find the defendant entitled to recover for such rental value, cannot be less than* $8,458.30, *together with* 8 *per cent interest thereon from and after the date that such equipment was removed; and that the amount*

to be allowed by you on this item cannot be more than $9,627.03.

I further instruct you that if you find that the defendant is entitled to recover on his first Counter-Claim to the First Cause of Action, he may recover, in addition to the rental value of the equipment as above referred to, the profits, if any, lost by him from the operation of his Juneau Coliseum Theatre because of the removal of said equipment; provided, that he can only recover, if at all, such profits as he may have proved himself entitled to under the evidence and these instructions.

And in this connection I instruct you that where a loss of profits results from the destruction, interference or injury to an established business, such profits may be recovered where the defendant makes it reasonably certain by competent proof what the amount of his loss actually was. In this connection I instruct you that the interest upon the capital invested, plus the expenses of the business, deducted from its income, for at least a few months or a few years prior to the interruption produce the customary monthly or yearly net profits of the business during that time and form a reasonably certain and rational basis for computation from which the jury may lawfully infer what these alleged profits, if any would have been during the alleged interruption if it had not been inflicted.

In this connection and for the purpose of further defining what has heretofore been said, I further charge you that when a regular and established business, the value of which may be reasonably ascertained, has been wrongfully injured or interrupted, the true general rule for compensating the party injured is to ascertain how much less value the business was by reason of the injury or interruption, and allow that as damages. This

gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are. Proof of the expenses and of the income of the business for a reasonable time anterior to, and during and after the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business.

Expected profits, are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present the necessary data for a reasonable and rational estimate of their amount. In this connection, however, I further instruct you that the loss of profits, if you find that there was a loss of profits, must be the proximate, natural and direct result of the alleged wrongful act, provided always, that you find that the removal was unlawful under these instructions, and without the intervention of an independent intervening cause.

In this connection, *I further instruct you that the total amount of anticipated profits that can be recovered by the defendant under the first Counter-Claim to the First Cause of Action, cannot be more than* $44,000; *that being the amount fixed by the pleadings of the defendant.*

I further instruct you that in addition to the rental value of the equipment, and in addition to the loss of profits above referred to, the defendant may further recover, if you find from the evidence and my instructions that he had a right to recover at all under the First Counter-Claim to the First

Cause of Action, for such expenses as he may reasonably and prudently have incurred in good faith in attempting to diminish damages such as are held recoverable under my instructions, and this is so whether the effort is successful or not, provided that it was in good faith. However, under this item, the defendant can only recover as in other cases such damages as he has actually proved.

He claims to have installed new equipment for the purpose of reducing the damages that would otherwise result from the removal of the equipment. If you find that he is entitled to recover because of the removal of such equipment in the Coliseum Theatre at Juneau under these instructions, then you may allow him whatever money you may find he has actually paid out in connection with the purchase and installation of such new equipment; provided, that such monies were paid out in a reasonable and prudent attempt, made in good faith to diminish such damages as under these instructions are held to be recoverable; and he is entitled to recover such monies even though the installation of such new machinery or equipment did not result in reducing such damages; provided, that the defendant acted in good faith and for the purpose above stated."

(Pr. Rec. Page 1005 et seq.).

The portions of the instruction to which an exception was taken were designated and pointed out specifically in the exception at the time the exception was taken, and they are as shown by the italics. No other portions of the instruction were excepted to. (Pr. Rec. Page 1026 et seq.).

In stating their grounds of exception, counsel for appellant use this language:

> "We claim that is not a statement of the true measure of damages and no profits can be recoverable in this case in any event."

But, the portions of the instruction to which exception was taken do not relate to the measure of damages at all. The measure of damages is something that is dealt with in other portions of the instruction to which no exception was taken, and which are, because of that fact, the law of the case. Nor would it have availed the appellant to have excepted to these portions of the instruction for the Court in dealing with the amount of recovery follows the decisions above referred to with such care and fidelity that there can be no question about the correctness of what is said. True, in the first paragraph excepted to, the Court instructs that if the jury find that the defendant is entitled to recovery rental value, the amount cannot be less than that fixed by the plaintiff in the pleading nor more than that fixed by the defendant in his pleadings. But, surely, this has nothing to do with the measure of damages; it merely places upon the amount of recovery, if there be a recovery, the limitations placed there by the parties themselves. Paragraph VI. of plaintiff's (appellant's) complaint reads in part as follows:

> "That the rental value of said equipment is $1,050.00 per year or for any part of a year." (Pr. R. P. 8).

And the defendant (appellee) fixes the rental value at $9,627.03. (Par. IV. defendant's first Counter-Claim, Pr. R. P. 43). The amounts in each case are for each theatre.

The second statement included in the portion excepted to, is incomplete in that it does not embody all that the Court said upon the subject. The portion of the Court's charge contained in this second paragraph of the exception, standing alone, might be construed as an instruction to the effect that the defendant (appellee) was entitled to recover anticipated profits in any event. Even if there were nothing more to it, it would not be so bad; for the uncontradicted evidence shows that appellee was doing a profitable business in long established concerns at Juneau and Ketchikan when the equipment was taken out, and no one would attempt to deny that to take the equipment out of a theatre would interrupt the business. But, we are not called upon to justify the statement excepted to on this ground. In indicating the portion excepted to appellant abruptly stops in the middle of a sentence. The concluding portion of the sentence, which follows the semi-colon at the close of the statement excepted to, reads:

> "provided, that he can only recover, if at all, such profits as he may have proved himself entitled to under the evidence and these counter-claims."

The Court then tells the jury just when and under what circumstances anticipated profits can be recov-

ered, just what proof can be considered, and just how certain the proof must be before a recovery can be had. Upon all these matters, the Court not only follows the law as declared in the decisions above referred to, but he employs the very language of the decisions. To this portion of the instruction no exception was taken.

The third portion of the instruction referred to in the exception merely limits the amount of recovery to the amount fixed by the pleadings. In stating the grounds of exception, appellant does not point out why this was error, and it is impossible to conceive how the Court could have erred in doing what it did in this regard.

The next ground of exception reads: "and furthermore, that the defendant cannot recover in this action upon his Counter-Claims in any event." This ground of exception is so general that no one can tell what is sought to be included. If it brings up anything for discussion, it brings up every possible point in the whole case. It is not suggested why a recovery cannot be had on the Counter-Claim. This it not a case where the defendant merely seeks to recover ordinary damages occasioned by the wrongful retention of property taken under a writ of replevin; but a case in which the defendant seeks to recover on Counter-Claims arising out of and based upon the same contract and transaction that serves as a basis for plaintiff's complaint. Such damages as ordinarily result from the wrongful reten-

tion of property taken by replevin, can be recovered under the general issue; but under the facts in this case the damages are such that they are properly recoverable under Counter-Claims. The taking and retention of the property under the writ constitutes a wrong, but the wrong resulted in the breach of a contract—the property taken was property which the plaintiff had agreed not to take. It was wrong to take the property and it was also wrong to break the contract.

The next ground of exception reads: "and further, that portion covering the purchase of new equipment, found on page 27 (last Par.) of that particular instruction, which we contend is not an element of damages in this case."

When a person is injured by the wrongful act of another, he cannot stand idly by and permit the damages to accumulate. It is his duty to do what he reasonably can to reduce the damages as much as possible; and when he does this, he may recover such expenses as he may have incurred in good faith. The rule is thus stated in Sutherland on Damages. Third Edition, Sec. 88, Vol. 1, page 257-258.

> "The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by negligence or wilfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him. This is a

practical obligation under a great variety of circumstances, and as the damages which are suffered by a failure to perform it are not recoverable it is of much importance. Where it exists the labor or expense which its performance involves is chargeable to the party liable for the injury thus mitigated; in other words, the reasonable cost of the measures which the injured party is bound to take to lessen the damages, whether adopted or not, will measure the compensation the party injured can recover for the injury or the part of it that such measures have or would have prevented. This is on the principle that if the efforts made are successful the defendant will have the benefit of them; if they prove abortive it is but just that the expense attending them shall be borne by him."

In the course of the opinion in Peck vs. Chicago Rys. Co., 110 N.E. 414, it is said:

"A person injured by another's breach of contract or tort is bound to use reasonable care to render the injury as light as possible and to protect himself from unnecessary injury. (Citing cases). Expenses reasonably and prudently incurred in good faith in making a proper effort to diminish the loss may be recovered, whether the effort is successful or not."

The case of Morrison vs. Queen City Electric Light & Power Co., 160 N.W. P. 438, decided by the Supreme Court of Michigan, is to the same effect.

The case of Den Norske American etc. vs. Sun Printing and Publishing Co. 122 N. E. 463, is an extreme case and most interesting. It was a libel case

growing out of an alleged libellous article published by the New York Sun concerning the plaintiff, which was the owner and operator of a line of steamers plying between New York and Norway.

The plaintiff claimed that the publication of this alleged libellous article greatly damaged its business, and in an effort to reduce the damages, plaintiff published in New York and elsewhere, and circulated newspapers, denials of the libellous statements published by defendant; that the cost of printing these denials was $2722.00.

In suing defendant, the plaintiff among other items claimed recovery of this sum of $2722.00. The trial court sustained a motion to strike this item of damages from the complaint. In reversing this, the New York Court of Appeals said:

> "Abundant reasons, in our opinion, support the conclusion that the injured party, at the risk of the wrongdoer, should be allowed, though not compelled, to attempt by a reasonable and proper effort to prevent damages liable to result from the wrongful act which has been committed against him. The alternative proposition is that the wrongdoer has the right to insist that the suffering party must sit still and allow damages to accumulate on the possibility that some time he may recover them. If the attempt is successful, it is for the benefit of the wrongdoer, and it is obvious that in securing the benefit of the effort he should pay the reasonable cost of it. The only chance for doubt would arise where the purpose failed, and even

then we think that if it is a proper one it should be at the risk and expense of the wrongdoer. It is his improper act that has promised the occasion and necessity for the effort, and he ought not to be allowed, by too narrow or rigid rules, to restrict the right of the one whom he has injured to seek to protect himself from harm or loss, by an attempt which, if it is successful, will be for the benefit of the offender himself. Where a wrong has been committed under circumstances which include the element of intentional, wilful and malicious injury, the author will be held responsible for the injuries which he has directly caused, even though they are beyond the limit of natural and apprehended results as established in cases where the injury was unintentional."

ASSIGNMENT NO. 10.

This assignment of error relates to the refusal of the Court to instruct as follows:

> "You are instructed that you cannot consider in ascertaining the amount of such net useable value, any good will or alleged loss thereof because I have heretofore stricken from this case all matters dealing with the question of good will and loss thereof, and, further, you cannot consider any alleged loss of profits in arriving at the amount of the net useable value of said equipments during said periods because the defendant has failed to prove with definiteness and certainty that he lost any profits at either of his said theatres." (Pr. R. P. 137).

To the refusal to give this instruction the appellant took a general exception, without stating any ground of exception. (P. R. P. 979). This exception is un-

availing because it is too general; but it is also unavailing for another and even more important reason. All the matters and things referred to in this proposed instruction were covered by those portions of instruction 8 (the instruction referred to under the previous assignment) to which appellant took no exception. The appellant not having excepted to those portions of instruction No. 8 relating to the matters dealt with in the proposed instruction, these portions of instruction No. 8 became the law of the case. If therefore the applicable law referred to in the proposed instruction differs from the instruction as given, the law as stated in the instruction as given governs.

Nor is there anything wrong with the action of the Court in refusing this proposed instruction. The Court in instruction No. 11 (Pr. R. R. 1018) instructed as follows: "You must eliminate from your consideration entirely any damages on account of loss of good will." This made it unnecessary to say anything further about loss of good will—the proposed instruction, in so far as it related to that subject, had been fully covered.

The remaining portion of the proposed instruction in which the Court is asked to charge the jury that profits cannot be recovered "because the defendant has failed to prove with definiteness and certainty that he lost any profits at either of his said theatres," cannot avail the appellant anything for the reason that the issue of whether or not the defendant lost profits

was submitted to the jury by instructions Nos's. 8 and 10, without exception on the part of appellant. Exceptions were taken to specific portions of these instructions, but not to the portions submitting this issue to the jury. Under the law of the case therefor, the submission of this issue was proper.

Again this matter, cannot be considered on appeal because the Bill of Exceptions does not purport to contain all the evidence, and the question of whether there is sufficient evidence cannot be considered unless all the evidence is in the Record. The Certificate to the Bill of Exceptions, reads:

> "*** do hereby certify that the foregoing Bill of Exceptions contains all the material facts, matters, things, proceedings, objections, rulings and exceptions thereto, occurring upon the trial of said cause and not heretofore a part of the record herein, including all evidence adduced at the trial, material to the issues presented by the Assignments of Error herein." (Pr. R. P. 1031).

The Court here certifies that the Bill of Exceptions contains all the evidence adduced material to the issues presented by the Assignments of Error; but this is far from saying that it contains all the evidence. In fact, the statement "all the material evidence" implies that there was other evidence which was not deemed material. If appellant desired to present a question for review which required a consideration of all the evidence, it should have asked the Court to certify that the Bill of Exceptions contained all the evi-

dence. All the evidence presented must be deemed material when it comes to preparing a Bill of Exceptions. When evidence is adduced at the trial, the Court passes upon its materialty, and the ruling of the Court may be excepted to and reviewed on appeal; but when a Court settles a Bill of Exceptions and rules that certain evidence is not material, the ruling cannot be excepted to and cannot be reviewed. Obviously, the Court cannot pass upon the materialty of evidence in this conclusive way. Nor can the party preparing the Bill of Exceptions place the burden upon the opposing party—the burden of suggesting material evidence left out of the draft when presented—it is the duty of the appellant to prepare and present the Bill of Exceptions, and prepare a proper certificate for the trial judge to sign.

The printed transcript contains a document not made part of the Record by Bill of Exceptions—but it is listed in the praecipe as one of the papers appellant desired transmitted. It shows that the Bill of Exceptions as originally presented contained practically no evidence upon any subject. It would appear that appellant desired to have the Court certify that this proposed bill which contained but little evidence contained all the material evidence; and that its aim was thereupon to convict the trial court of error on the ground that there was a lack of evidence. (P. R. P. 1033 et seq.).

But there is enough evidence in the record to show that the Court was right in submitting the issue

to the jury—much less evidence would have been sufficient.

The evidence adduced showed that the appellant, under the writ of replevin issued in this case, took out the equipment in appellee's Juneau theatre on the 20th day of April, 1931; and out of the Ketchikan theatre on the 28th day of April, 1931; and that at the time the equipment was taken out of the Juneau theatre the defendant Gross had been operating this theatre for twenty-one years, and that at the time the equipment was taken out of the Ketchikan theatre the appellee Gross had been operating that theatre for a period of twenty-three years. (P. R. P. 317); and that at all times up to the times mentioned, both of these theatres had uniformly been operated at a profit. (Ev. Gross, P. R. P. 362-363-374).

When the equipment was taken out, under the writ of replevin, the appellee installed other equipment. This equipment was not as efficient as the equipment that had been taken out, but it was the only equipment that the appellee could get at that particular time. (P .R. P. 360-361). As the result of the installation of this inferior equipment the business of both theatres gradually went down. The appellee tried to make improvements in the equipment so as to bring it up to standard, but he couldn't do it—the result was that appellee suffered a loss of profits of from Two Thousand to Three Thousand Dollars a month in both

theatres. Appellee had always made money in both theatres until the equipment was removed. (P. R. P. 362-363). The appellee continued to lose money in both theatres until he made an arrangement with one Shearer, under which he turned the theatres over to Shearer. (P. R. P. 364). Shearer immediately commenced negotiations for the installation of Western Electric Equipment in both theatres. (P. R. P. 364-365). That was the same type of equipment that had been removed. Until the Western Electric Equipment was again installed, Shearer lost money, but immediately upon the installation of the Western Electric Equipment he commenced to realize a profit. (P. R. P. 366). Between the time the equipment was taken out by appellant and the time the new equipment was installed by Shearer, the losses were so great that the appellee was unable to pay his taxes and unable to meet his indebtedness at the bank. Appellee testified that he was unable to testify to exact amounts, adding that these would have to be testified to by his bookkeeper, but that he knew the facts above referred to by his own personal observation; and further testified that he had five other theatres at that time, all paying, and that the profits from these other five theatres were used to keep the Ketchikan and Juneau theatres open, besides a considerable amount of rent money that he collected from month to month. (P. R. P. 366).

The evidence shows that during the year 1929, at

the Ketchikan theatre, the receipts and expenses and the net profit earned were as follows:

EXHIBIT NO. 1.

PROFIT AND LOSS STATEMENT

1929

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	$2,203.90	$2,166.46	$ 37.44	
February	2,222.15	1,876.30	345.85	
March	2,489.95	1,293.29	1,196.64	
April	2,697.50	1,539.29	1,158.21	
May	3,766.30	2,012.06	1,754.24	
June	5,931.00	2,270.17	3,660.83	
July	6,234.07	4,220.48	2,013.59	
August	7,519.70	3,236.05	4,283.65	
September	6,682.75	2,635.33	4,047.42	
October	7,209.70	2,698.26	4,511.44	
November	5,705.85	2,472.71	3,233.14	
December	4,314.20	2,497.11	1,817.09	
	56,977.07	28,917.53	28,059.54	
	28,917.53			
Proof	28,059.54			

Memorandum:

Net profit for year 1929	$28,059.54
Depreciation taken during year 1929	5,717.25
Actual net profit for year 1929	$22,342.29

(P. R. P. 485).

And the same data for the year 1930 is contained in the following exhibit:

EXHIBIT NO. I-1.

PROFIT AND LOSS STATEMENT

1930

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	$4,462.30	$2,020.75	$2,441.55	
February	3,942.70	2,821.06	1,121.64	
March	4,310.35	1,654.74	2,655.61	
April	4,727.70	1,014.68	3,713.02	
May	4,848.35	2,725.71	2,122.64	
June	4,504.05	1,661.01	2,843.04	
July	4,821.25	2,599.36	2,221.89	
August	4,365.35	1,683.75	2,681.60	
September	5,625.75	1,479.67	4,146.08	
October	4,613.00	2,613.44	1,999.62	
November	3,741.25	1,633.44	2,107.81	
December	2,813.15	1,972.98	840.17	
	$52,775.20	23,880.53	28,894.67	
	23,880.53			
Proof	$28,894.67			

Memorandum:

Net profit for year 1930	$28,894.67
(Less)	
Depreciation taken during year 1930	5,717.25
Actual net profit for year 1930	$23,177.42

(P. R. P. 506).

And the same data relating to the year 1931 is contained in the following statement:

EXHIBIT NO. I-2.

PROFIT AND LOSS STATEMENT

1931

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	$3,290.35	$2,457.70	$ 832.65	
February	3,059.05	2,418.61	640.44	
March	3,422.00	1,760.18	1,661.82	
April	2,987.15	1,613.95	1,373.20	
May	2,741.60	1,794.34	947.26	
June	2,877.05	1,831.52	1,045.53	
July	2,957.80	2,305.85	651.95	
August	2,853.20	1,862.08	991.12	
September	2,966.30	1,955.70	1,010.60	
October	2,607.40	1,098.31	1,509.09	
November	2,312.00	2,300.16	11.84	
December	1,438.35	2,313.71		$ 875.36
	$33,512.25	23,712.11	10,675.50	875.36
	23,712.11		875.36	
Proof	$ 9,800.14		$9,800.14	

Memorandum:

Net profit for year 1931	$9,800.14
(Less) Depreciation taken during year 1931	5,717.25
Net profit for 1931	$4,082.89

(P. R. P. 520).

And the profits and losses resulting from the operations of the Ketchikan theatre in 1932, after the equipment was taken out, are shown upon the following tabulation:

EXHIBIT NO. 1-3.

PROFIT AND LOSS STATEMENT
1932

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	$ 977.84	$1,601.69	$	$ 623.85
February	1,428.90	1,544.44		115.54
March	1,414.75	1,691.84		277.09
April	1,491.10	1,104.87	386.23	
May	1,193.90	1,343.59		149.69
June	733.35	622.90	110.45	
July	1,047.63	1,044.33	3.30	
August	1,192.67	1,176.62	16.06	
September	1,387.20	1,633.80		246.60
October	1,784.13	1,226.86	557.27	
November	1,244.10	1,721.31		477.21
December	1,034.95	671.07	363.88	
	$14,930.52	15,383.32	1,437.18	1,889.98
		14,930.52		1,437.18
Proof		$ 452.80		$ 452.80

Memorandum:

Net Loss for year 1932	$ 452.80	
Depreciation taken for 1932	4,152.20	
	$4,605.00	(Loss)

(Pr. R. Page 534).

And the result of the operation at the Ketchikan theatre during the remaining months of 1933 prior to the leasing of the property to Shearer is shown on tabulation I-4, which is as follows:

EXHIBIT NO. 1-4.

PROFIT AND LOSS STATEMENT

1933

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	$1,004.68	$ 966.45	$ 38.23	
February ..	988.30	1,003.44		15.14
March	695.05	794.30		99.25
April	634.79	896.71		$ 261.92
	$3,322.82	$3,660.90	$ 38.23	$ 376.31
		3,322.82		38.23
Proof		$ 338.08		$ 338.08

Memorandum:

Net loss for year 1933	$ 338.08	
(Plus) Depreciation taken for (4) months	1,042.18	
		$1,380.26 (Loss)

House leased to B. F. Shearer on May 1st, 1933. (P. R. P. 548-549).

The average monthly profit for 1929, before the taking of depreciation was $2,328.29, and after the taking of depreciation was $1,861.85. The average monthly profit without depreciation during 1930 was $2,407.89, and after depreciation was $1,931.45; and that in 1931, it being the year when the equipment was taken out, after the month of April the average monthly profit declined gradually until it reached $816.87 before depreciation, and $340.24 after depreciation. In 1932, it being the year when the theatre was operated throughout the entire year without appellant's equipment, there was an average monthly loss before depreciation of $37.73, and an average monthly loss after depreciation of $383.75; and during the first four months of 1933, it being the period that elapsed before the Shearer lease commenced, there was an average monthly loss without depreciation of $28.17, and an average monthly loss after depreciation of $115.12. During the period that elapsed between May or June, 1929, and April, 1931, this being the period when the theatre was being operated with appellant's equipment, a period of 23 months, there was an average monthly profit before depreciation of $2,476.96, and after depreciation $2,000.52; and that for the period of approximately two years between the time that the equipment was replevined by the plaintiff and the time the theatre was turned over to Shearer, the average monthly profit before depreciation was $187.55 with an average monthly loss after depreciation of $187.70.

That there was an average loss of profits during the period while the theatre was being operated without appellant's equipment, after it had been taken out by appellant, before depreciation, of $2,289.41 and after depreciation of $2,188.22; and that the total loss resulting from the taking out of the equipment, based on the difference between profits earned before the equipment was taken out and profits earned after the equipment was taken out, calculated up to the time of the Shearer lease, before depreciation was $52,-656.43, and after depreciation of $50,326.06. (P. R. PP. 558-559-560).

After the Ketchikan theatre was leased to Shearer and while the old equipment was still in the theatre, the loss during May, 1933 was $203.68; (P. R. P. 561) during June, 1933 the loss was $343.79. (P. R. P. 562). The testimony is that the Western Electric Equipment was installed about two months after Shearer took the property over. (Ev. Gross, P. R. P. 365). During July of 1933 the Ketchikan theatre made a net profit of $177.94; (P. R. P. 562). During August of 1933 the Ketchikan theatre had a loss of $60.92; (P. R. P. 563) in September of 1933 the Ketchikan theatre made a net profit of $856.49; (P. R. P. 564) in October of 1933 the Ketchikan theatre made a net profit of $242.12. (P. R. P. 565). From then on the Ketchikan theatre showed slight losses during some months and considerable profit during others, but the general trend of the business was decidedly

upwards. (P. R. P. 566 et seq.) In November, 1934, the profits had risen to $1,555.32. (P. R. P. 573). This was higher than it was during the preceding or following month. The profit during the preceding month being $838.14 and that during the following month being $503.15, but it shows the extent to which the business had recovered after the installation of the plaintiff's equipment under the Shearer lease.

Similar statements showing the exact amount of receipts and disbursements and profits, month by month, for the Juneau theatre throughout the entire four year period covered by the Ketchikan statements were received in evidence. (P. R. PP. 578, 598, 614, 631, 647). On page 656 of the transcript is the statement showing the average monthly profit and loss for the Juneau theatre. This shows that the average monthly profit before depreciation, during the period commencing May, 1929, and ending May 1, 1931—that is to say the period while the plaintiff's equipment was installed in the theatre—was $1,404.46 and was $864.15 after depreciation; and that the average monthly profit during the months following the taking out of the equipment until Shearer took the theatre over was $64.17 before depreciation and that the average monthly loss after depreciation, during that period was $489.98. That the difference in average monthly profit between the two periods was $1,340.29 before depreciation, and $1,354.13 after depreciation; and that the loss in profits resulting during the period after

the equipment was taken out was $32,165.96. (P. R. P. 656-657).

On page 658 et seq. of the printed Record occur statements of profits and losses after the theatre was taken over by Shearer. These statements do not show as great a recovery in business after the Shearer lease commenced in the Juneau theatre as was shown in the Ketchikan theatre, but this is due to special reasons which are explained by the witness Gross on pages 470-471 of the transcript.

The summaries above referred to were taken from the books of the appellee, and were prepared by the witness Tuckett who testified to their correctness. These books were received in evidence and marked as Exhibits H. up to and including Exhibit H-8. They were not incorporated in the Bill of Exceptions, but were transmitted to this Court by order of the Trial Court. These books contain all the records of the business transactions of the Coliseum theatre of Juneau, from 1927 until the date of the trial, and of the Alaska Film Exchange and also of the Coliseum theatre at Ketchikan, from 1927 until 1933. (Ev. Tuckett P. R. P. 482-483). The books are not formal but are altogether complete. The theatre business being a cash business they show the receipts from the box office from day to day; and the bills against the theatre being paid once a month, they show the monthly expenses, showing just how much was paid to each

person and what it was paid for. But while the books show all the receipts and expenditures in connection with the operation of the theatres, they also contain some other items relating to the conduct of apartment houses, and some other activities of the appellee Gross. This made it necessary to call as a witness the witness Tuckett who had been acting as manager for the appellee Gross throughout this entire period, and who knew what the various items in the books represented and what they were for, so as to be able to separate the receipts and disbursements of the theatres from these other items. The witness Tuckett made up from these books what are generally referred to in the evidence as work-sheets. These work-sheets are nothing more nor less than a complete set of books showing all the recipts of both theatres, and all the expenses of both theatres item by item during the entire four year period, which includes approximately two years of operation with appellant's sound-equipment installed, and approximately two years of operation after appellant had taken out the sound-equipment under the writ of replevin and until the theatres were turned over to Shearer. These so-called work-sheets were received in evidence those relating to the Juneau theatre being received as defendant's Exhibits K-1 to K-6 inclusive, and those relating to the Ketchikan theater being received as defendant's Exhibits I to I-6 inclusive. These so-called work-sheets are incorporated in the Bill of Exceptions; those for Juneau appear in the printed record

between pages 578-656, and those for the Ketchikan theatre occur in the printed record commencing on page 485 and continuing up to and including page 558. (P. R. P. 578-656; 485-558).

Referring to these Exhibits, the bill of exceptions shows that the witness Tuckett testifies: "That the items of expense shown on the work sheets attached thereto were taken from the books offered in evidence; that those books contained other items besides these, that it is just the same as these books; that he knows of his own personal knowledge what items belong to the Juneau Coliseum theatre; that he figured from the total items in the books those items only in making up these statements; that he knows from his own personal knowledge that those were the only items that belonged to the Juneau Coliseum theatre for 1929, and that that goes for all other statements that he had prepared that are to be offered in evidence." (P. R. P. 597).

The witness Tuckett testified to his personal knowledge of these various items at various times while he was on the witness stand. (Ev. Tuckett P.R.P. 504); (P.R.P. 708-709-710-712-720). On page 723 is a further statement bearing upon this matter where the witness Tuckett testifies: "I personally checked out all the items constituting that difference for March, 1929, the same way I did the other, by actual knowledge of what they were for based upon my personal know-

ledge." (P. R. P. 723). And on pages 653-654 the witness Tuckett testifies: "I carried 6 per cent on the capital investment as rent; those are the only items; all the other items were taken from my books as actually expended for the Coliseum theatre; they are correct; the allocation is fair; the work sheets show all the receipts and expenses, and the result in profit and loss; these statements (defendant's Exhibits series I and K, also J. L.) are all made on the same basis; the items of expense are taken from the books (defendant's Exhibits series H) in evidence; I know of my personal knowledge what items belong to the Juneau Coliseum Theatre, and only those items were used, and that goes for all these statements (defendant's Exhibits series I and K, also J and L); they contain only items in the books referring to the Coliseum Theatre; this property was depreciated by taking 5 per cent on buildings and things of that sort and 10 per cent on the machinery and furnishing; that depreciation was taken throughout." (P. R. PP. 653-654).

In cross-examination the witness Tuckett testifies that there were some small items in the books of the defendant which were left out of consideration in making up the I and K series of Exhibits, because he was in doubt about them. In re-direct examination on page 757 he testifies concerning these items as follows: "I stated that there were some small items left out of those accounts that I prepared; I could not say exactly without going over the whole statement which

they are, but Witness Stabler, who helped me make the accounts up—we took it under advisement and couldn't decide on the matter, whether it really belonged to the theatre or not so we left them out; the limit of the amount of them, I think would be around $250.00 which would cover it;" (P. R. P. 757). The witness Tuckett was thoroughly and widely cross-examined with relation to the correctness of the various items contained in the I and K series of Exhibits, and with relation to his knowledge concerning specific items. On the I and K Exhibits appears one column which is headed 'rent.' This column in truth and in fact represents the interest on capital investment. This matter is explained by the Witness Tuckett on page 504. (P. R. P. 504).

And on page 505 this witness testifies: "We made an actual appraisement of the Ketchikan theatre property in 1929, and the figure we used represented the result of that appraisal, of which we took 6 per cent and used that as rent, being in fact, interest on capital investment. (P. R. P. 505).

The capital investment at Juneau was arrived at in the same manner, and on the work-sheets the term "rent" means 6 per cent of the capital investment. (P. R. P. 652).

Statements containing summaries of these appraisements were offered and received in evidence and

marked as Exhibits I-5, page 555, and Exhibit K, page 575. (P. R. P. 555; 575).

The bank-books of appellee kept during the period above referred to were offered and received in evidence and marked as defendant's Exhibits U. U-1, and U-2; the bank statements supplied appellee by the bank from month to month, commencing with 1929 up to and including May, 1933, were also offered and received in evidence and marked as defendant's Exhibit X. Concerning Exhibit X the witness Tuckett testifies on page 712 as follows: "This large bundle of papers contains all the bank statements and checks covering the entire period from 1929 to May, 1933, including defendant's personal business, and also other business. By personal knowledge I could tell what these checks are; the checks are all here to back up the expenditures I have testified to, except one or two possibly which have been offered separately." (Ev. Tuckett, P. R. P. 712).

On page 765 of the Printed Record, it is shown that the bundle previously marked as Exhibit X was offered in evidence; and on page 766 Exhibit X was received in evidence. Exhibit X is not incorporated in the Bill of Exceptions except by reference; the original, however, was sent to this Court for inspection. It will be noted that the checks in the Exhibit are segregated by months and wrapped up in the bank statements for the respective months.

Exhibit U, U-1, and U-2, were incorporated in the Bill of Exceptions, and are shown on page 767 et seq. Now it is true that these books of the appellee contain many items that do not belong to either the Ketchikan or Juneau theatres, and that one not familiar with the books would, no doubt, find much difficulty in determining which items belonged to the theatres and which items did not; but the appellee called Mr. Tuckett, the man who had kept the books and who had personal knowledge of all the items, and he testified concerning them, and segregated the items that belonged to each of the respective theatres, and made statements referred to as work-sheets which showed the receipts and each item of expenditure, to whom paid, and for what paid; and the bankbooks and bank statements are offered to check the correctness of the items in the books and the statements made therefrom. And so, also, the checks for each amount paid out are in evidence so that anyone can check each payment of expenses incurred. Of course, the weight of the evidence depends to a large extent upon the confidence the jury reposed in the veracity of Tuckett; but the question we are now discussing is not, "What was the weight of the evidence" but, "Was there evidence to submit to the jury?" The question of its weight was for the jury and not for the Court. And in this respect these books of the appellee do not differ so widely from other books kept in a more formal manner. What accountant is there who will examine a set of books

in the absence of the man that kept them? Books are never so complete but what it is necessary, to their proper understanding, to have the man that kept them at one's elbow. True, Tuckett might tell false-hoods about these entries, but it is also true that a bookkeeper might make false entries in a formal set of books. In the last analysis the whole matter hinges upon the veracity of the bookkeeper. Ordinary books, under the modern doctrine, are received in evidence even though the bookkeeper by whom they were kept cannot be produced; it is only necessary to show that they were kept in the ordinary course of business. Here we have a set of books, to the correctness of which the bookkeeper testifies, and statements made from these books, which are verified on the oath of the bookkeeper item for item.

The appellant called as a witness, Mr. James C. Cooper, who represents himself and who, no doubt, is an accountant of wide experience. He testified on page 881 and elsewhere, that he had nothing to go by except the books themselves, and that he had drawn certain conclusions based upon his own judgment, and to other facts which lead to the conclusion that that was the best he could do because he knew nothing about the entries. He testified on page 882 that the entries could have been supported either by an invoice of supporting papers, or by the person who made the payments provided that he was truthful. He was then asked:

Q. If you had the man who made the payments and told you about these, you would know, if he were truthful.

A. If he were truthful, certainly.

(P. R. P. 882).

Mr. Cooper here tells the whole story. It all depends upon the truthfulness of Tuckett, and the question of whether Tuckett is truthful is one for the jury. If Tuckett testified truthfully the evidence received was as certain and as definite as evidence could possibly be made; it showed the profit in dollars and cents, with exact accuracy, during the two year period preceding the removal of the equipment, and it showed, with exact accuracy, in dollars and cents, the profits made and losses incurred during the two year period that followed after the equipment had been removed. It showed the exact amount lost in each theatre in profits during the period that elapsed after the equipment had been removed, as compared to the period during which the equipment was in the theatres. This is not only the best evidence that can be offered, but the only evidence, and satisfies in every respect the requirements of the decisions to which we have previously referred. Under this evidence the Court instructed the jury as follows :

"And in this connection I instruct you that where a loss of profits results from the destruction, inter-

ruption, interference or injury to an established business, such profits may be recovered where the defendant makes it reasonably certain by competent proof what the amount of his loss actually was. In this connection I instruct you that the interest upon the capital invested, plus the expenses of the business, deducted from its income, for at least a few months or a few years prior to the interruption produce the customary monthly or yearly net profits of the business during that time and form a reasonably certain and rational basis for computation from which the jury may lawfully infer what these alleged profits, if any, would have been during the alleged interruption if it had not been inflicted.

"In this connection and for the purpose of further defining what has heretofore been said, I further charge you that when a regular and established business, the value of which may be reasonably ascertained, has been wrongfully injured or interrupted, the true general rule for compensating the party injured is to ascertain how much less value the business was by reason of the injury or interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are. Proof of the expenses and of the income of the business for a reasonable time anterior to, and during and after the interrup-

tion charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business.

"Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present the necessary data for a reasonable and rational estimate of their amount."

(P. R. PP. 1007-1008).

It will be noted that these instructions given by the Court not only follow the decisions to which we have referred, but are in the very language of the decisions. The identical language is used by the Court in Instruction No. 8 and Instruction No. 10; and this portion of these instructions, as has already been noted, was not excepted to by the appellant—this, notwithstanding the fact that it submitted to the jury the issue which it now contends should not have been submitted at all. The instruction was fair, and the propriety of submitting the issue to the jury became established as the law of the case when appellant failed to except to the language of the Court; but above and beyond all this, the law and the evidence were such as not only to permit but to compel the Court to submit the issue to the jury.

After the foregoing had been written and printed, appellant served its Brief, in which the matters referred to are discussed on page 39 under Point VI.

In its Brief appellant urges two objections against the instructions of the Court, which are as follows:

> "A. The jury was permitted to award double damages;
>
> "B. The jury was permitted to award damages for lost profits which were wholly speculative and conjectual."

Neither of these grounds is included in any exception taken at the trial; nor are they referred to in any error assigned.

Point A. is discussed on page 40 et seq. of appellant's Brief. It is there urged that under the instructions given, the jury were permitted to assess double damages. It is a complete answer to all that is said by appellant in its Brief that no exception was taken on this ground. Nowhere in the Record is there an exception on the ground that under these instructions, or any other instructions, the jury were permitted to award double damages. If appellant wished to avail itself of this point it was its duty to call the attention of the trial court to it, to the end that the trial court might correct the error if an error had been made. In the absence of such exception the point cannot be brought up for review.

But there is no merit in the point stated by counsel. It is true, that as a general proposition, double damages cannot be allowed, but under the instructions in this case the jury were not permitted to award double damages. It must be remembered that the appellant leased to appellee this theatre equipment for a period of ten years, and that appellee paid appellant, in advance, prior to the removal of the equipment, the full sum of $10,500.00 as rent for the equipment in each theatre; that is to say, the sum of $21,000.00 for the equipment in the two theatres, so that appellee had an estate or an interest in this equipment worth $21,000.00 at the time of its installation, and a proportionate amount to cover the unexpired term at the time of its removal. When the equipment was removed, this estate or interest was destroyed, and the rental value sought to be recovered was merely the value of this estate or interest which was destroyed by appellant; it amounted merely to a recovery of advance rent paid appellant by appellee. This amount appellee would have had a right to recover in any case, but in this patricular case the taking of the property had the additional effect of interrupting and interferring with a going, established business, so that it resulted in additional damages, and these additional damages consist of the profits that would have been realized if the equipment had been left in place. The authorities and cases cited by counsel have no application. In the cases cited, the property was taken and returned, so that there was no loss of

property, no diminution of the estate or interest in it, because the property itself was returned to the injured party. In the case at bar, the equipment was taken away and shipped out of the territory, and was never returned to the appellee, so that he lost all that he had paid the appellant as rent for the equipment during the entire remaining portion of the ten year period. When appellant broke its contract by wrongfully taking the equipment from the appellee, the advance rent paid by appellee for the remainder of the term was one of the elements of damage which appellee suffered and had a right to recover; and because of the fact that the taking of the property from appellee resulted in breaking up an established business, the profits that were lost were another item of damages which the appellee had a right to recover. It is not necessary to pursue this argument further, however, because the point cannot avail the appellant, for the reason that it was not included among the grounds of exception taken.

Referring now to Point B., which is discussed on page 42 et seq. of appellant's Brief, and which is to the effect that:

> "The jury was permitted to award damages for lost profits which were wholly speculative and conjectual."

The character of the evidence offered has already been discussed; and for that reason it is necessary only that we reply to the arguments of counsel set forth in his

Brief. Our discussion was had under Assignment of Error No. 9, and Assignment of Error No. 10. We are appending this to the discussion under No. 10 because it relates to what was said under both 9 and 10. But before doing this, we feel that we should again call the Court's attention to the fact that the matters here referred to by counsel were not embodied in any exception taken, and that portions of the instruction submitting the issue of damages to the jury were not excepted to at all on any ground. The propriety of submitting the issue to the jury was therefore established as the law of the case. But even though appellant did ask for an instruction, which though uncertain and indefinite in its terms might possibly be regarded as a request to take the issue from the jury, appellant cannot now contend that the Court erred in submitting the issue and refusing its instruction, because by failing to except to the instruction submitting the issue, which thereupon became the law of the case, it waived the point now sought to be urged. Then, too, nothing but a general exception was taken to the refusal of the Court to give this instruction so requested, and no grounds of exception were stated.

(Pr. Rec. P. 979).

Commencing on page 42 of apellant's Brief, appellant's counsel states the evidence as follows:

"When plaintiff removed its equipment from defendant's theatres, defendant replaced that

equipment with other equipment, which, although the best then obtainable, was inferior in sound quality to plaintiff's equipment. During the two years from approximately June 1, 1929 to May 1, 1931, while plaintiff's equipment was in defendant's theatres, defendant operated those theatres at an average monthly profit of $2,000.52 at Ketchikan and $864.15 at Juneau. During the period after plaintiff's equipment had been removed, from approximately May 1, 1931 to May 1, 1933, defendant operated those theatres at an average monthly loss of $187.70 at Ketchikan and $489.98 at Juneau, whereupon defendant leased both theatres to one Shearer who, shortly thereafter, removed the equipment then in these theatres and replaced it with plaintiff's equipment, similar to that originally installed and subsequently removed by the plaintiff. During the eighteen months immediately following the re-intallation of plaintiff's equipment in these theatres, Shearer, the lessee, operated the Ketchikan theatre at an average monthly profit of $629.70, and the Juneau theatre at an average monthly loss of $267.62."

This statement of the evidence is very incomplete, but it is fair enough as far as it goes. It should be borne in mind, however, in this connection, that both the Ketchikan and Juneau theatres were operated by Shearer for some considerable time with the inferior equipment installed, and that during this period his losses were as great as those sustained by Gross, and that the profits commenced to increase immediately after the installation of better equipment, and that the business which had been broken down because of the

inferior equipment was gradually built up after the new equipment had again been installed, so that the average monthly profit at Ketchikan, including the months while Shearer was operating with the inferior equipment, was $629.70, while the average monthly loss at Juneau, including the months while the inferior equipment was still in the theatre, was $267.62. And in this connection it must also be borne in mind that there were special reasons, already referred to, why the profits in Juneau did not increase to the same extent that those in Ketchikan had increased, under the Shearer management.

Thereupon, on page 43 of appellant's Brief, counsel submits the following conclusions:

> "(1) Defendant wholly failed to show that plaintiff's removal of its equipment caused defendant any loss of profits.
>
> "(2) Defendant wholly failed to show the amount of such loss, if any, caused by the removal of plaintiff's equipment."

On page 43 of appellant's Brief counsel says:

> "It is well settled that lost profits cannot be recovered unless both the fact and the amount of such loss is established by something more than speculation or conjecture."

We fully agree with this statement, but we do not agree with counsel's conclusions as to what is required to satisfy the requirements mentioned. To support his

views, that appellee did not comply with these requirements, counsel quotes from the case of the Homestead Company vs. DesMoines Electric Company, 248 Fed. 439. This decision was rendered by Judge Sanborn, and was based upon a decision previously rendered by the same Judge in the case of the Central Coal & Coke Co. vs. Hartman, 111 Fed. 96.

Following the quotation set out by counsel occurs a citation of this case and no reference to any other authority, so that there can be no question but what Judge Sanborn intended, for all intents and purposes, to embody what was said in the Central Coal & Coke Company case, as part of what was said in the Homestead case.

Now, in the case of the Central Coal & Coke Co. vs. Hartman, 111 Fed. 96, after stating that as a general rule profits cannot be recovered, Judge Sanborn said:

> "There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly income he derives from it for a long time before, and for the time during the

> interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital investment and the expense deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made, the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff had lost."

Now, in the case at bar, appellee did just exactly what was required by the decision of Judge Sanborn last above quoted from. The capital investment was carefully arrived at, interest was allowed on it, the property was depreciated in a manner that was not questioned by anyone, the amount of the monthly expenses covering the business and the amount of the monthly income derived from it were shown not only for a long time before but also during the interruption of which appellee complains. In fact, the whole case was tried with a view of bringing it within the provisions laid down by Judge Sanborn; and under those circumstances Judge Sanborn says:

> "The interest upon his capital and the expenses of his business deducted from its income

> for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff had lost."

The entire decision of Judge Sanborn in the Central Coal & Coke Company case is interesting, and a more extended quotation from that decision appears at an earlier point in this Brief.

At a later point in the decision Judge Sanborn indicates the character of proof required, and here again the decision was followed in the case at bar to the letter.

Following this quotation from the Homestead case, on page 44 of appellant's Brief, counsel makes the statement that the removal of appellant's equipment in April, 1931, could not have caused the defendant any loss of profits unless it caused a decrease in the number of persons attending defendant's theatres, and it is then contended that there was no evidence that the decrease was due to the removal of appellant's equipment.

Well, in addition to the fact that the appellee Gross, testified that there was a loss of business immediately after the inferior equipment was installed (Ev. Gross, Pr. Rec. P. 362); we have these uncontradicted facts before us—facts which are embodied in the statement of the evidence as counsel sets it forth on page 42 of his Brief. Plaintiff's efficient sound-equipment was taken out of a sound moving-picture theatre, and in its place equipment of an inferior character was installed. This was followed by a loss of attendance and a loss of profits. Now, would any rational person be warranted in assuming that this loss of attendance and loss of profits did not result from the fact that inferior equipment had been installed in the place of the efficient equipment that had been removed?

Counsel seems to be of the opinion that appellee should have called each of his customers who ceased going to the theatre after the inferior equipment had been installed, and who ceased going because the equipment was inferior. We are of the opinion that the trial court would soon have put an end to the calling of such witnesses.

If counsel's position upon this point were sound, one who had destroyed or interrupted a mercantile business, for instance, could not be called upon to pay damages unless the injured party brought in all his customers, who had to buy a yard of calico or a pound of sugar, and had them testify that this failure to buy

the calico and sugar was due to the injurious act of the person who had destroyed or interrupted the business —and like results would follow in connection with all other lines of business.

Counsel then says, on page 44 of appellant's Brief:

> "Under the evidence, as the case went to the jury, the decrease in attendance at defendant's theatres in May 1931-33 might have been caused by any one of many equally possible causes, other than the removal of the plaintiff's equipment."

Counsel then proceeds by assuming that the financial and economic depression was one of the causes for loss in attendance. This assumption is not based upon anything contained in the Record and is wholly at variance with the facts. The economic depression commenced in 1929 and was on throughout the period between 1929 and 1931 during which appellee made profits, as well as the period following the removal of the equipment when the losses occured. But counsel takes the position that the court very properly took judicial notice of the existence of this depression; if so, the Court would, with equal propriety, take judicial notice of the fact that Juneau, a town within its jurisdiction, is a gold-producing camp that thrived during the depression. No one testified that there was any depression in Juneau, and those who testified that there was a depression in Ketchikan also testified that the depression there commenced in 1929 and not at the time

the equipment was removed, although it was testified that the depression became worse later on.

Counsel complains because the appellee did not prove that the depression was not in any way to blame for the loss of his profits; but it was not for the appellee to prove the depression was not to blame for loss of profits. If a business depression were in fact in any sense to blame for it, it was for appellant to produce this proof. This very point was before the Supreme Court of Illinois in the case of Chapman vs. Kirby, 49 Ill. 211. In that case the Court used this language:

> "It has long been well recognized law that when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade, or other causes, they would have been less? Nor can we expect that in actions of this character, the precise extent of the damage can be shown by demonstration. But by this means they can be ascertained, with a reasonable degree of certainty."

It will be noted that the Court says:

> "And to measure such damages, the jury must have some basis for an estimate, and what more

> reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade, or other causes, they would have been less?"

The burden of showing that the depression, or any other cause, had any effect upon the matter, therefore rested upon the appellant; nor could it be otherwise. If appellee were called upon to prove that the depression did not affect the situation, he would also be called upon to prove, for the same reason, that no other possible cause had had any effect upon it. A rule such as this would result in compelling the anticipation of one hundred and one defenses that would have no existence in fact.

The case cited by counsel on page 45 of appellant's Brief, Willis vs. S. M. H. Corporation, 259 N. Y. 144, has no possible application. The plaintiff in that case was a mere employee who had been discharged. He was not a man who had an established business that had been interrupted. True, part of his remuneration came from his solicitation of member to a Club, but no one would call this an established business.

Counsel next complains because it was not shown that the loss of business was not due to new competition. In the first place, there was no evidence of new competition. In Juneau, for instance, the Capitol Theatre had been operating for a long time as a sound-producing theatre. This theatre had been operated for

a matter of ten or fifteen years, and for some time at least, prior to the removal of appellant's equipment from the Coliseum Theatre, the Capitol Theatre had been operated with sound equipment installed in it.

(Pr. Rec. 847 Ev. Kubley)

It is true that during the winter of 1931 the Palace theatre was renovated and its name was then changed to the Capitol Theatre; and it is possible that because of this it became stronger competition, but the appellant proved this, and the jury evidently took it into consideration because, while appellee proved a loss of profits amounting to $28,888.10, the jury's verdict fixes the amount lost at Juneau at $19,440.00.

There was also evidence in the Record that some of the theatres in Ketchikan had been renovated about that time, and the jury evidently took this into consideration, as well as the depression existing at Ketchikan, for while appellee proved the damages to which he was entitled at Ketchikan to be $44,952.28, the jury only allowed him $12,320.00.

Appellant also complains because he says still another cause may have contributed to the loss in business, and that is the type of pictures shown, but appellee Gross testifies that he always at all times got the best pictures in the United States. Of course, these pictures might even then vary, just as the quality of sugar or calico might vary, but we don't imagine that counsel

would contend that a merchant whose business had been broken up would be called upon to show that the various items of merchandise he carried were, during the periods that were relied upon for the basis of comparison, of the same quality or equally salable. If the pictures had anything to do with it, then appellant could have established that fact by evidence, but it was not incumbent upon the appellee to anticipate this or any other similar contention or objection that appellant's counsel might make.

If these contentions of appellant's counsel were sound, it would lead to the establishment of a rule under which anticipated profits could never be proved and could never be recovered; but under the law as it is stated by the Supreme Court of Illinois in Chapman vs. Kirby, above referred to, it is only necessary to take the profits for a reasonable period next preceding the time when the injury was inflicted leaving the other party to show that by depression in trade, or other causes, they would have been less.

If any causes, such as counsel refers to, had anything to do with the reduction of profits, it was incumbent upon counsel for appellant to present evidence to the jury upon that subject.

On page 47 of appellant's Brief, appellant attempts to show that the box office receipts in appellee's theatres were progressively getting less both before as well as after the removal of the equipment. Now if this

were true that would be a point that apellant could have argued to the jury and the jury would have considered it, for obviously the whole matter would present a question of fact for the jury to pass upon, but the difficulty with the statement made by appellant is that it is very misleading.

Referring to Appendix A., attached to appellant's Brief on page 54, which shows the box office receipts at various times, we find that it is true, as counsel states, that in July, 1929, the box office receipts at Juneau were $6,308.40. This was when the sound equipment was first installed. It was then a new thing and probably for that reason or some other reason this was an especially good month—at no time were the box office receipts at the Juneau theatre as large. For the first four or five months, while this equipment was in, the box office receipts were especially high, but commencing with December, 1929, we find that they were something over $4,000.00—from then on the receipts were quite uniform, sometimes a little more and sometimes a little less. In December, 1930, for instance, they were something over $5,500.00. If counsel's methods were to be adopted, this would show a progressive increase between the box office receipts in 1930 over those of 1929—but it didn't, it simply shows that in the theatre business, as in every other business, the volume of business fluctuates more or less from month to month. In November of 1930, for instance, the receipts were only $3,900.00 and something—$1,600.00 less than they

were in the following month. This doesn't show that appellee's business was getting better in the fall of 1930—it simply shows that all months are not alike. The only way to arrive at the value of a theatre business, or any other business for that matter, is to take the average for a number of months, as we have done in this case.

But, turning now to the 1931 column on Appendix A. page 54, we find that in May, the first month after the equipment had been removed, the receipts dropped down to something over $2,000.00. Now, then, during the entire period that precedes the month of May, 1931, there was not a single month during which the receipts did not exceed $3,000.00; then as we go down the column for 1931, and down the column for 1932, we find that there is only one month when the receipts were as much as $3,000.00, and that was in August of 1931, not long after the equipment had been removed, and obviously before appellant's patrons had found out all about it, and even then it was only $3,100.00.

Now, turning to the Ketchikan schedule, counsel says that in July of 1929 the box office receipts were $6,200 and something, while in July of 1930 they had dropped down to $4,800. and something, and that in July of 1931, after the equipment had been removed, they had dropped down to $2,900. and something. Now this is all true enough, but it doesn't prove anything except that the business of theatres, as well as the busi-

ness of other institutions, fluctuates more or less from month to month.

But the table Appendix B. does show that following the removal of the equipment there was a marked decrease in the box office receipts not only for one month but for all months—there were no more big months after the equipment had been taken out. True, the customers probably kept coming for a while before they were discouraged by the inferior equipment, but the general average reduction in receipts is striking, and it is even more striking to note that in 1934, after appellant's equipment had been reinstalled by Shearer, during the months of November and December, the business had almost been brought back to what it was before the equipment had been removed. If these figures prove anything they prove that counsel's contention is wrong; but however that may be, this whole question is one for the jury and we will therefore not burden this Court by going into the Record to show what the testimony really proves. It may be stated, however, that here is some evidence in the Record giving the reason as to why the attendance during some months is larger than in other months, but these reasons apply with equal force during the period when the equipment was in and the period when the equipment was out.

On page 48 of appellant's Brief, counsel quotes from the testimony of the Witness McKinnon, who tes-

tified that he went to the theatre both before and after the removal of the equipment, and it may be parenthetically stated that McKinnon also testified that the new equipment that was installed after the appellant's equipment had been removed was very inferior as a sound-producing device to the equipment that had previously been in the theatre. But counsel quotes from this testimony to show that McKinnon didn't stay away. Well, no one ever contended that all the customers stayed away; if they had the theatre would have been closed; but it is also true that no one ever denied that many of the customers did stay away and that that resulted in a loss of profits.

It is hardly necessary to say that we do not concur in the view of appellant that it was incumbent upon the appellee to bring in as witnesses all his customers who stayed away because of inferior equipment. Clearly, if it were necessary to bring in one such customer, it would, for the same reason, be necessary to bring in all of them.

On page 49, however, after counsel had complained bitterly because witnesses were not called to prove that as the result of the removal of the equipment there was a loss of business, counsel complains because appellee was permitted to testify that after the removal of the equipment there was a loss of business. And it may be added, that appellee, while he testified in general terms, stated that his testimony was based upon

his own observations. And counsel adds that appellee's conclusions upon this point were destroyed by his own further testimony to the effect that he had five other theatres operating in Alaska in which this same inferior equipment was installed, and that these five other theatres made a profit. But counsel fails to add that appellee also testified at the same time that there was no R.C.A. or Western Electric equipment in competition with those theatres.

(Pr. Rec. P. 472).

But the Record also shows that these other theatres were small theatres in small towns.

(Pr. Rec. P. 835, Ev. Dalner).

And the fact that the equipment would work in a small theatre doesn't necessarily prove it would work in a larger theatre; it might have lead the appellee to hope that it would, but all the evidence is that it didn't, and we doubt very much that appellant would now, or at any time, seriously contend that this cheap equipment which appellee was forced to install when the better equipment was taken out of the theatre was such that it would draw as large a crowd as appellant's high-priced equipment would draw. Appellee was simply forced to install this cheap equipment because it was the best he could get, and the installation of this equipment was the only thing he could do to save his business from utter collapse by keeping his doors open and his theatre going.

Appellant's counsel then proceeds to consider the second proposition on page 49 of his Brief, and maintains that defendant has wholly failed to show the amount of his loss of profits, if any, caused by the removal of the plaintiff's equipment. In support of this proposition appellant quotes four and one half lines from the opinion of the Central Coal & Coke Company vs. Hartman, 111 Fed. 96. Immediately following the portion of the opinion quoted by counsel occurs this language:

> "The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly incomes he derives from it for a long time before, and for the time during the interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff had lost."

Had counsel read on until he had read the whole opinion, he would have found that the evidence in this case complies exactly with the requirements of the decision in the case of the Central Company vs. Hartman, in which this opinion was rendered. It should be noted that on page 50 of his Brief, counsel makes the statement that appellee had no competition until the opening of the Capitol Theatre at Juneau on January 15, 1931. This is an error as has already been shown. The Capitol Theatre at Juneau was renovated in January, 1931, but it had been operated as a theatre for many years and it had been operated with sound-equipment prior to that time.

(Pr. Rec. P. 847).

There is considerable evidence in the Record to show that appelllant had had considerable competition both at Juneau and Ketchikan prior to that time, but we do not consider it necessary to review it because the question of what effect incoming competition had was one for the jury, and the burden of proving of what the incoming competition consisted was upon the appellant, as we have already shown.

Counsel refers to the case of Freidman vs. McKay Leather Co. 178 Pac. 139, but that case is not in point. That was an action to recover for breach of an agency contract and not an action to recover prospective profits for the interruption or destruction of an established business. Even so, however, statements made by the

Court in that case are such as to indicate that the Court recognized the fact that where prospective damages can be proved with reasonable certainty, as they can be in a case where an established business is interrupted, such damages are recoverable.

Counsel then again returns to the case of Central Coal & Coke Company vs. Hartman, 111 Fed. 96, and quotes another portion of that opinion, including the statement:

> "And the monthly and yearly income he derives from it for a long time before and for the time during the interruption."

Counsel again breaks off his quotation too soon. He cites this authority with a view of showing that it is not sufficient to show what the profits were for a period of two years, and that two years, according to counsel's view, is not a long time, while the Court says "for a long time before"; but if counsel had added a few more lines to his quotation he would have been informed upon the question as to what the quotation meant by the use of the term "for a long time before", for immediately following the word "complains" with which he ends his quotation, occurs the following, "The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption." The term "for a long time" therefore means for a few months or years. In the case at bar the exact income for a period of two

years was established by appellee not only for a few months but it would be 24 months—many months.

In addition to this, however, there is other evidence in the Record, and it is that appellee had been conducting these theatres for a period of something like 20 years, and that during that entire period there had never been a time these theatres were not profitable and were not paying investments.

(Pr. Rec. P. 362).

While the exact amount of profits was only shown for a period of two years, we do not believe that any Court would permit a party to encumber the Record by showing what his exact profits were, from his books, for a period of twenty years, even though the books covering this entire period had been preserved, which would in no case be likely.

On page 53 counsel complains that the Verdict must have been speculative because the jury didn't award the appellee all the damages that he proved; in other words, the total amount proved for Ketchikan and Juneau were in each case much larger than the amount of damages allowed. But counsel forgets that the Courts permit the party inflicting the injury to introduce evidence of depressions, incoming competition, and of any other fact that would tend to lessen the damages; this is merely evidence allowed in mitigation. If the law permits the party inflicting the in-

jury to offer such evidence, it must follow that the jury have a right to consider it. In this case the jury evidently considered the evidence offered by appellant upon these points, and reduced accordingly, the damages, that would otherwise have resulted. Surely appellant shouldn't complain of that.

Moreover, the verdict is not objected to on the ground that it was speculative, nor is that point urged by any exception or error assigned anywhere in the record.

Counsel says that no case could be found to better illustrate the injustice of allowing the jury to mulct a party in large damages. Counsel's position evidently is that appellant should be allowed to lease this equipment, collect the rent for ten years, at the end of two years take it out, keep the equipment and also the advance rent that had been collected, and that if the taking out of the equipment destroyed appellee's business it was just too bad. We do not think that any such doctrine finds any support in the law. It is correct to say that as a general proposition speculative damages cannot be recovered in any case, but this does not mean that damages must be proved to a mathematical certainty. Damages are allowed for pain and suffering, for injuries depending for their severity upon the uncertain duration of life, for loss of earning power, the value of which must necessarily depend not only upon the duration of life but also upon the opportunities to

earn that the future may present, and for one hundred and one other things that are such that the amount of the damages cannot be determined with mathematical exactness, but it must be left to the sound discretion of the jury. All that the law requires is that facts be established from which the jury can establish the amount with a reasonable degree of certainty. The authorities we have cited, and from which we have quoted, establish the fact that the appellee in this case produced evidence of facts that in every way meet this requirement of the law; and counsel has produced no authorities whatever to show that this requirement has not been met.

We have discussed the cases cited by counsel, and a glance at the text of "The Restatement of the Law of Contracts" including what precedes, as well as what follows the portion quoted, will show that that work in nowise supports counsel.

ASSIGNMENT NO. XI.

Assignment of Error No. XI relates to the refusal of the Court to give the plaintiff an instruction to the effect that the defendant could not recover on account of the purchase or cost of installation of new equipment. This point has already been fully discussed in connection with our discussion of Assignment of Error No. 9. Moreover, the exception taken to the action of the Court is general in its terms and states no

grounds, so that it raises no question of law. (See Page 165 of this Brief).

ASSIGNMENT NO. XII.

This alleged error is not relied upon in appellant's brief as ground for reversal.

This Assignment of Error relates to a ruling of the Court, under which the appellee Gross was permitted to testify that, as a result of having inferior equipment after the better equipment had been removed by the appellant under the writ of replevin, he lost business and profits in both of his theatres. The competency and materiality of this testimony depends upon the question of whether there was evidence in the case that was such as to permit the recovery of lost and anticipated profits. As has already been pointed out, both of the theatres—the theatre at Ketchikan and the one at Juneau—had been operated by him for something like twenty years. The business of both theatres had always been profitable; the exact amount of profits realized during a period of about two years prior to the removal of the equipment was shown in dollars and cents, and was shown to be very large. All of this testimony appears in the Record and has been previously commented upon, so that it need not be gone into in detail at this time. Nor did the appellant attempt to deny that the appellee had a going established business from which he was realizing large profits at the time the equipment was taken out.

Now, there is no dispute in the evidence about the fact that the equipment was taken out by appellant, and it cannot be disputed or denied that the taking of the sound-equipment out of a talkie theatre is bound to have the effect of interrupting the business of the theatre. There was evidence also tending to prove that the taking out of the equipment by appellant was wrongful, and was not justified under the contract existing between the parties. Under these circumstances, there can be no question about the admissability of evidence relating to lost and anticipated profits, for as has already been pointed out in the decisions, such profits can be recovered if established with reasonable certainty in any case where an established business has been interrupted. (See Page 146 et. seq. this Brief).

It may be true that standing alone the evidence given by the appellee Gross in general terms would not be entitled to such weight—it would have to be supported by more detailed and specific evidence; but the fact that it was not in itself entitled to much weight did not affect its admissability.

ASSIGNMENT NO. XIII.

This alleged error is not referred to in appellant's brief.

This Assignment of Error relates to a ruling of the Court made in sustaining an objection to the admission of certain Exhibits, marked for identification

as No's. 43, 44, and 53. No. 43 consists of several documents fastened together. These include printed "Form 1040—Treasury Department—Internal Revenue Service" and is headed: "Individual Income Tax Return for the calendar year 1929—W .D. Gross, Juneau, Alaska; Occupation Motion Pictures." And forming part of the same Exhibit as offered are a letter from the Internal Revenue Service to Gross, dated February 3, 1932; a printed form of letter from David Burnet, Commissioner of Internal Revenue, to Gross, dated February 3, 1932; a typewritten statement headed "In re: Mr. W. D. Gross, Juneau, Alaska. Tax Liability year 1929"; printed form 870, Treasury Department, (in duplicate) headed: "In re: Mr. W. D. Gross, Juneau, Alaska; waiver of Restrictions on Assessment and Collection of Deficiency in Tax", which is unsigned; a printed notice reading, "That this is a copy of the report of the Examiner on the Income Tax Return", to which is attached a printed form of letter No. 850, dated Dec., 1931, addressed to the defendant, and headed: "In re: Income Tax. Date of Report: Dec. 17, 1931. Recommendation, etc"; and to this letter are attached five typewritten sheets containing detailed statements of the adjustments in defendant's income tax return, followed by a printed form relating to the statements of the total tax liability, previously assessed taxes, and the adjustments proposed in the accompanying report, making a statement of the deficiency; the correct tax, followed by a letter dated Dec. 26, 1931, from the defendant to the Internal

Revenue Agent relating to these matters; and this in turn is followed by a letter dated January 4, 1932, to Gross from George C. Earley, Internal Revenue Agent in Charge. All these papers are attached together and are offered as one Exhibit, numbered 43. The Exhibit is described in an abbreviated form on page 139 et seq. of the Printed Record, but the original bundle of papers offered as one Exhibit under No. 43, as well as those offered under 44, and 53, were transmitted to this Court for inspection.

No. 44 consists of a proported copy of an income tax return made by Gross for the year 1930. As part of the Exhibit offered, and attached thereto, is a Notice with a copy of the report of the Examiner of Income Tax Returns; and a letter upon the stationery of the Treasury Department, Internal Revenue Service, dated 528 Republic Building, Seattle, Washington, July 8, 1932, addressed to W. D. Gross, Juneau, Alaska, headed: "In re: Income tax. Date of Report: June 21, 1932. Years Examined: 1930", and stating in substance that "enclosed is a copy of the report covering examination recently made by a representative of this office concerning your income tax liability which is furnished for your information and files." This letter contains numerous other statements, and is signed by George C. Earley, Internal Revenue Agent in Charge; and to this letter are attached 36 sheets of typewritten matter, giving a detailed statement of the Internal Revenue Bureau's adjustment of the de-

fendant's Income Tax Return. All of these papers, including the proposed copy of the Income Tax Return, and the letters and other statements from the Internal Revenue Department, were attached together and offered as one Exhibit, No. 44.

The other Exhibit offered, being plaintiff's Exhibit marked for identification as No. 53, also contains a proported copy of an Income Tax Return for the year 1932, for W. D. Gross and wife. Attached to this and forming a part of the bundle offered as one Exhibit, is a letter from George C. Earley, Internal Revenue Agent in Charge to W. D. Gross and Wife. This letter is dated at Seattle, Washington, July 26, 1933, and is headed: "In re: Income Tax—Years Covered: 1932."

Exhibits marked for identification as Nos. 43 and 44, are offered at the same time and together, to which the following objection was made:

"Object to them as irrelevant, incompetent and immaterial. They have been properly submitted to counsel for the purpose of interrogating a witness on such questions as he wished. He availed himself of that purpose. The only witness who knew anything about them was then on the stand. Counsel knew he was going to leave. He has since left the Territory and cannot be recalled. For the further reason that counsel objected to the income tax returns when they were offered by us when the witness was here to explain

them. They were ruled out on counsel's objection. While one was admitted before the ruling was made they were withdrawn by us on the understanding that the court had ruled against them." (P. R. P. 856).

No offer of proof was made by appellant and the purpose for which the exhibits were offered was not stated.

This objection was sustained by the Court.

The bundle marked for identification as Exhibit 53, was offered in evidence as one Exhibit, and to the offer so made the following objection was interposed:

"Object to this offer for the reason it is irrelevant, incompetent and immaterial—the further reason that it is not a record and can be used for no other purpose in the case except for the purpose of impeachment; that the offer was submitted to counsel for that purpose, so that he might cross-examine Mr. Tuckett, who made the income tax report, while he was on the stand and was then here, and used for that purpose and Mr. Tuckett admitted on questions asked of him concerning it and afterwards explained the situation, so that there was nothing to impeach him on, and for the further reason that the Witness Tuckett has since left the Territory and since explanation cannot be made now; counsel being advised at that time Mr. Tuckett was about to leave, and further reason counsel for the defendant offered the income tax returns in evidence

while the Witness Tuckett was here and on the stand so that he might explain them, whereupon counsel for the plaintiff objected to them and the objection was then by the court sustained, so he is now estopped from claiming anything under these income tax returns whatever; the further reason they are incompetent, irrelevant and immaterial; and it is not proper rebuttal. (P. R. PP. 885-886).

Appellant did not make an offer of proof or state the purpose for which the exhibit was offered.

This objection was sustained by the Court.

The Bill of Exceptions contains the following statement:

"Be it further remembered, that when the copy of defendant's income tax reports, attached to and embodied in the offer marked for identification as plaintiff's exhibit No. 43, and the copy of defendant's income tax report embodied and attached to the offer marked for identification as plaintiff's exhibit No. 44, and the copy of defendant's income tax report attached to and embodied in the offer marked for identification as plaintiff's exhibit No. 53, were offered in evidence by the defendant while the witness Tuckett was on the stand, it was understood by Court and Counsel on both sides that the witness Tuckett was about to leave the Territory for Portland, Oregon.

And be it further remembered, that when the plaintiff offered in evidence what is marked as plaintiff's exhibits Nos. 43, 44, and 53, it was known to Court and Counsel on both sides that the witness Tuckett had departed from the Territory of Alaska." (Pr. R. P. 886).

The first point that presents itself is this: Each of the bundles of papers marked for identification as Nos. 43, 44 and 53, respectively, contain not only purported copies of defendant's income tax returns, but also other papers. In all cases the proposed exhibits contain one or more letters from officials of the Internal Revenue Bureau, addressed to Gross; and in one or more cases there are also statements, reports, etc., made out by officials or agents of the Internal Revenue Department. Clearly, these letters, statements, and reports, were not competent evidence against Gross, yet they are attached to and form part of the exhibit as offered, so that they make the whole Exhibit inadmissable. It is not the duty of the Court to go through a bundle of papers offered as one exhibit and to select from it such portions as may be competent and reject others. If one portion of an exhibit as offered is incompetent or immaterial, the whole exhibit as offered becomes inadmissable. This applies to each of the three proposed exhibits. Included in each exhibit also are purported copies of income tax returns. No showing is made as to why the originals were not produced. While the objection, as made, does not spec-

ifically include the ground that the copies offered were not the best evidence, the incompetency was stated as one of the grounds of objection.

Turning now to the question of whether these income tax returns would be admissable under the circumstances in the case if they had been offered as separate exhibits, without being attached to other incompetent and immaterial papers, and without regard to the question of whether copies would be admissable, we submit the following:

Demand was made for the income tax returns under the Statute and they were produced. Then, while the witness Tuckett was on the stand the following proceedings were had:

(Testimony of Charles M. Tuckett).

Thereupon witness Tuckett testified: Defendant's Exhibit M for identification is defendant's income tax return for 1929.

Whereupon the following proceedings took place:

MR. HELLENTHAL: I offer that in evidence.

MR. ROBERTSON: Same general objection, if the Court please.

THE COURT: It may be received.

MR. ROBERTSON: Exception.

THE COURT: You called for it yourself.

MR. ROBERTSON: We wanted to inspect it, is all.

Q. Calling your attention to Defendant's exhibit "M", that is Mr. Gross' income tax report for 1929?

A. Yes.

Q. Does that show the same profits and losses you show in your tabulation for 1929?

A. I can't say exactly whether it shows the same or not.

Q. It is calculated exactly the same way?

A. Yes sir.

Q. Did you prepare them?

A. Yes, sir.

Q. You are familiar with them?

A. Yes.

Q. State whether that can be checked down to show the same system for Ketchikan your tabulation and reports show.

A. Yes.

Q. Have the same methods been applied to that as to your report?

A. Yes sir.

Q. With reference to the films, for instance, do they show in there as expenses of the Coliseum theatre in Ketchikan and Juneau or in Ketchikan with the Alaska Film Exchange?

A. Alaska Film Exchange.

Q. Alaska Film Exchange is also calculated in that?

A. Yes sir.

Q. And what other theatres?

A. That is all in this one—the two theatres Juneau and Ketchikan and the Alaska Film Exchange.

Q. There were no other theatres at that time?

A. Not that Mr. Gross controlled.

Q. That is the only income tax report you made during 1929?

A. Yes.

Q. And that shows the situation as it is shown in your reports?

A. Yes sir.

THE COURT: Does that include other incomes except from these two theatres?

A. Yes.

Q. (THE COURT) Is it separated in such a way that it will be intelligible?

A. The incomes do, but the expenditures is other than could be applied to the two theatres. It shows expenditures all over the circuit in different places.

Q. Show the expenditures over all the various circuits?

A. Well, it shows he has got receipts on that income from what he received from the apartments, and as we explained in the Juneau part of the salaries the full salaries included in that report are for only half charged to the Coliseum theatre?

Q. It shows here all charged to the Coliseum theatre?

A. It is all charged in the report we made, blanket report of salaries and expenditures and substracted from the amount of money he received.

Q. How about the small theatres?

A. He was getting returns from some of them.

Q. Does that show in here?

A. Yes.

Q. Under a separate head?

A. I will have to look and see—yes—this shows the total rent from the apartment and stores included in that item there.

Q. That doesn't show the expenses of the Coliseum by itself?

A. No sir.

Q. Nor the expenses of the Coliseum in Ketchikan by itself?

A. No sir.

Q. It would require quite a little bookkeeping to arrive at your exact figures the way you have it segregated?

A. Yes, that is why we made the work sheets.

Q. But the ultimate result—is that the same?

A. Yes.

Q. That is, the profits shown were so much from Juneau or so much from Ketchikan, is that the same as the profit arrived at by you?

A. No.

Q. Why isn't it?

A. Because that was taken in blanket form.

Q. You took in more expenses, they wouldn't belong to the Coliseum theatre?

A. Yes.

Q. Either at Juneau or Ketchikan?

A. Yes.

Q. So your profits would be somewhat larger than these?

A. Yes.

Q. That is due to the fact that you, as you say, took in other expenses in the Gross apartments, bills and things of that kind?

A. Yes.

Q. But are not charged in your report because they didn't belong to the theatre, is that true?

A. Yes sir.

Q. I hand you here a paper marked'M-1'. Look at it and state what that is.

A. Income tax return for the year 1930, covering all of Mr. Gross' business.

Q. Covering all the Gross theatres in operation, of every kind?

A. Yes sir.

Q. What does that include?

A. All Mr. Gross' holdings.

Q. All of Mr. Gross' holdings. Did you prepare this?

A. Yes sir.

MR. HELLENTHAL: I offer that in evidence.

MR. ROBERTSON: We make the same general objections, if the Court please.

THE COURT: I think these both ought to be denied, at least for the time being. It is more confusing than anything else.

MR. HELLENTHAL: The Court rules out the previous one also?

THE COURT: Yes.

MR. HELLENTHAL: Let it be understood the previous exhibit is not in evidence, and this is also denied. And the court will make the same ruling on the income tax for 1931?

THE COURT: Yes.

MR. HELLENTHAL: We offer that and it may be ruled out; withdraw the previous offer, Your Honor.

THE COURT: Very well.

MR. HELLENTHAL: Withdraw both for 1929 and 1930 also."

(P R. PP. 667, 668, 669, 670, 671).

Later in the proceedings and while the witness Tuckett was still on the stand, and the income tax returns were being inquired about, and the witness had been asked about this or that figure, and he, having testified on page 731 that he couldn't answer these questions in relation to figures in the Income Tax Returns without an explanation of the Income Tax Returns, counsel for appellee made the following statement:

"We have no objection to counsel asking about these income tax reports, provided the witness be permitted to do what I tried to get him to do. I offered these in evidence. Counsel objected, and the Court sustained the objection, but counsel having objected and they being excluded, I now insist they be placed in evidence and the witness be permitted to explain the whole thing—all put before the jury and the witness given a chance to explain them." (P. R. P. 732).

This statement gave counsel an opportunity to agree to the admission of these income tax reports if

he desired to inquire further about them. This was not a statement under which counsel for appellee agreed that the Income Tax reports might be offered in evidence at any time, but that they might then be received in order that they might be fully explained by the witness Tuckett who had made them. Had counsel for appellant then consented to their introduction there would have been no question about it—but he failed to do this. The witness Tuckett was then on the stand and it was understood by both Court and Counsel that he was about to leave the Territory. (See Bill of Exceptions, P. R. P. 886).

Later, after the witness Tuckett had left the Territory (See Bill of Exceptions, P. R. P. 886) and when that fact was known to both Court and Counsel, the Income Tax returns were offered in evidence, not by appellee but by appellant. The appellee's counsel then objected to the offer as made on the following ground:

"Object to them as irrelevant, incompetent and immaterial. They have been properly submitted to counsel for the purpose of interrogating a witness on such questions as he wished. He availed himself of that purpose. The only witness who knew anything about them was then on the stand. Counsel knew he was going to leave. He has since left the Territory and cannot be recalled. For the further reason that counsel objected to the income tax returns when they were of-

fered by us when the witness was here to explain them. They were ruled out on counsel's objection. While one was admitted before the ruling was made they were withdrawn by us on the understanding that the court had ruled against them." (P. R. P. 856).

The foregoing offer only included two of the income tax returns; the third was offered later, and the proceedings relating thereto appear on page 885 of the printed Record. The offer as made was objected to on the following grounds:

"Object to this offer for the reason it is irrelevant, incompetent and immaterial—the further reason that it is not a record and can be used for no other purpose in the case except for the purpose of impeachment; that the offer was submitted to counsel for that purpose, so that he might cross-examine Mr. Tuckett, who made the income tax report, while he was on the stand and was then here, and used for that purpose and Mr. Tuckett admitted on questions asked of him concerning it and afterwards explained the situation, so that there was nothing to impeach him on, and for the further reason that the Witness Tuckett has since left the Territory and since explanation cannot be made now counsel being advised at that time Mr. Tuckett was about to leave, and further reason counsel for the defendant offered the income tax returns in evidence while the witness Tuckett was here and on the stand so that he might explain them, whereupon counsel

for the plaintiff objected to them and the objection was then by the court sustained, so he is now estopped from claiming anything under these income tax returns whatever; the further reason they are incompetent, irrelevant and immaterial; and it is not proper rebuttal."

(P. R. P. 885-886).

The objection was in each case sustained.

In neither case did appellant make an offer of proof or state the purpose for which the papers were offered. It was its duty to do this in order that the court might be informed. Having failed to inform the court, appellant cannot now complain about the ruling made by the court.

It cannot be conceded that when a man makes an income tax return he is bound by the statements therein contained in other proceedings. The income tax returns are made out for a definite purpose, and so long as they accomplish that purpose it is immaterial whether the segregation between different lines of activity are properly made or not. In this case the income tax returns included all of Mr. Gross' various lines of business. The object was to show the net income from these combined enterprises without regard to how much each of the separate enterprises contributed to it. To illustrate: In the income tax returns all the film rentals were charged to the Ketchikan theatre. This made no difference in the income tax re-

turn, because it didn't affect the general result. The tax was not computed on the profits from the Ketchikan theatre but on the profits of all the various enterprises conducted by Gross. (P. R. P. 758).

However, in determining the profits of the Ketchikan theatre as a separate institution, it would, of course, be improper to charge that theatre with more than its proportion of the film rental, in view of the fact that these films were used at first in two and later in a considerable number of theatres. By lumping all of these various businesses in one income tax report, similar situations would no doubt arise with reference to other matters. While the witness Tuckett was here he was able to explain matters of this kind, which, without explanation would appear as discrepencies; and it may be added that without such explanations the income tax returns could lead to nothing but confusion.

Then, also, it may be added that most persons when making out an income tax return make their income as small as they think they possibly can under the law. It may be that they shouldn't do this, but they do it, and this opens up another field where explanation may often be required.

The appellee offered these income tax returns while the witness Tuckett was in Juneau, so that he could explain them. Appellant objected to their introduction. The specific grounds of objection were not

stated, but the appellant did object, and it is immaterial what the grounds of objection were so long as the Court ruled with appellant. In making the objection as it occurs on page 667, counsel for appellant used this language:

"Same general objection, if the court please."

Referring back to page 654 of the printed record, where the preceding objection occurs, it is stated in this language:

"Object to all this line of testimony as incompetent, irrelevant and immaterial; it doesn't go to the true measure of damages." (P. R. P. 654).

In any event, the income tax returns were ruled out by the Court on the objection of the appellant at a time when the witness Tuckett, who made up the income tax returns and was the only person qualified to explain them, was available and in Court so that he could make the necessary explanations and make the income tax returns themselves intelligible; and at that time Court and Counsel on both sides knew that the witness Tuckett was about to leave the Territory. Then later, when the witness Tuckett had left and when Court and Counsel knew that he had left so that he could not be recalled to make an explanation of the apparent discrepencies and make the returns intelligible, they were offered by appellant. Now, independent of these considerations, it is a general rule

of law that when a party at the trial objects to the introduction of certain evidence and induces the Court to exclude the evidence on his objection, he cannot afterwards offer the same evidence, and complain if the Court adheres to its former ruling made at his instance, and again rules out the testimony offered. While it is true that the Court can change its ruling upon any point at any time during the trial, a ruling made at the request of a party becomes the law of the case so far as that party is concerned, and he will not be heard to complain if the Court afterwards adheres to this ruling.

This point has often been decided by the Courts. In the case of Trott vs. Chicago R. I. & P. Ry., 87 N.W. P. 722 (Sup. Ct. of Iowa), it was held that:

"Where defendant's objection to certain evidence on the ground of irrelevancy was sustained, it was not entitled to object to the exclusion of evidence on the same subject subsequently offered in its own behalf."

In Crawford vs. Wolf, 29 Iowa 567, it was held that:

"A party cannot complain of the admission of evidence under a rule adopted by the court, claimed to be erroneous, when such rule was adopted at the instance or upon the suggestion of the party complaining." The same is true of rulings rejecting evidence. If it was immaterial as claimed by defendant in its

objection to the question put to the plaintiff on his direct examination, it was surely immaterial as to questions put to the witness Biddings. Defendant, having invited the ruling that the condition of the guard-rails at other stations then at Muscatine was immaterial, may not complain of the application of the same rule to its offer of proof. In view of this state of the record, we think appellant is in no condition to question the ruling complained of."

The case of Commonwealth vs. Fitzgerald, 123 Mass. P. 408, (Sup. Ct. of Mass.) was a trial of defendant on an indictment for an assault with intent to ravish. The person assaulted testified that the defendant assaulted her; that she knew where he lived; and that during the same week she made complaint to the officer who made the arrest. The government offered evidence of what she told the officer at that time, which, upon the defendant's objection, was excluded. The defendant, for the purpose of showing that she did not tell the officer that he was the man who assaulted her, offered to prove that, up to the time of his arrest, he was generally at his home, and that no effort was made to arrest him until a week after the alleged assault. The defendant, still objecting to the evidence offered by the government which had been excluded, the judge declined to admit the evidence offered by the defendant.

The Supreme Court held that defendant had no ground of exception.

The case of Swift vs. Union Mutual Marine Insurance Co., 122 Mass. P. 573, was an action on a policy of marine insurance. The Supreme Court of Massachusetts said:

"The examination of the witness called by the plaintiff to prove the condition of the ship, as to soundness and strength when she sailed from New Bedford was objected to by the defendant, and was waived by the plaintiff, at the suggestion of the court; the defendant having admitted her seaworthiness. After that the court properly refused in that stage and aspect of the case to allow the defendant to cross-examine the witness and put in evidence on that subject matter."

The case of Fischer vs. Franke, 47 N.Y. Supp. P. 161, was an action for damages for personal injuries. There was a judgment for plaintiff; and defendant appealed to the Appellate Division of the Supreme Court, which said:

"The only ruling assailed, exclusive of those relating to the charge, is the refusal of the court to permit evidence as to whether any complaint had been filed with the department of public works in regard to anything concerning the bridge, or the said premises in course of construction. We think this ruling was right, and for two reasons: If the plaintiff had sought to recover upon the ground of a nuisance, such testimony might have in some way been relevant, but where the action was predicated upon the negligence of the

defendant in constructing and maintaining, for an unreasonable time, a bridge which was defective, and which was used by the public as a substitute for the sidewalk, this, if proven, could in no way be affected by the question whether complaints were or were not filed with the department of public works. The second reason lies in the fact that similar evidence was sought to be introduced by the plaintiff in questions put to one of the policemen as to whether he had ever made a report to the public authorities of the unsafe condition of the bridge; and under the defendant's objections such evidence was excluded. While it is true that the objection was to the form of plaintiff's question, there is little reason to doubt, with respect to one of the questions at least, that the court's ruling was based upon the theory, not only that the question was erroneous in form, but that the evidence sought to be adduced was irrelevant and incompetent. *Having successfully got the court to take this position, we do not think that when the defendant sought to introduce similar evidence, he can, with good grace, urge that it was error on the part of the court to apply the same rule.*"

In the case of Best vs. Wohlford, 94 Pac. P. 98, the Supreme Court of California held that:

"Where the trial court had refused to admit any evidence by defendant in support of a tax title, (on plaintiff's objection), it was error to allow plaintiff to introduce evidence in rebuttal to show that the tax

deed was invalid because of defects in the proceedings."

In the case of Seininski vs. Wilmington Leather Co., 83 Atl. P. 20, (Sup. Ct. of Delaware), for personal injuries caused by defective machine, one of plaintiff's witnesses was asked "whether the machine, on the day of the accident, was a dangerous machine." To this question the defendant objected, and the objection was sustained .

Defendant, later in the trial, asked one of its witnesses "whether there was any hidden or obscure danger of any kind about this machine." This question was objected to by the plaintiff upon the ground that plaintiff had not been permitted to introduce testimony along similar lines. The objection to defendant's question was sustained. A verdict for plaintiff was approved.

In the case of Curtiss vs. Jebb, 96 N.E. P. 120, judgment was for plaintiff, and defendant appealed. The court of appeals of New York said:

"Upon this appeal there are only two questions that survive the unanimous affirmance by the Appellate Division. One relates to the exclusion of certain testimony offered by defendant, and the other arises upon the form of judgment entered in favor of plaintiff. As to the first of these questions, we have only to say that, since the trial court, upon defendant's ob-

jection, had previously excluded similar evidence offered by plaintiff, the ruling excepted to by defendant was clearly right."

CONCLUSION.

This is not a case where it is assigned as error that the verdict is not sustained by sufficient evidence, or that the verdict is excessive. Indeed, the record shows that the verdict might have been for a much larger amount without being open to either of these objections.

It is important to note at this point that nearly all of the exceptions brought up for review are general in their nature and state no ground of exception at all, and that in those cases where there is an attempt to state ground of exception, the grounds are stated in such general and uncertain terms that they present nothing for consideration, for the reason that they do not sharply and specifically call the trial court's attention to the error, if any, so that it might be corrected. Indeed, some matters, as we have pointed out, that were discussed by counsel under his six points in appellant's Brief, relate to things that were not excepted to at all.

The assignments of error all relate to technical erorrs supposed to have been made by the Court. The various exceptions have been discussed, and it has been pointed out that none is well taken, but it should be added that most of the alleged errors presented are such

that they would be harmless even though they were well-founded under the facts and circumstances in the case.

The right of the appellant to recover depended upon the question of whether it had a right to collect service charges from the appellee; and the question of whether appellant had the right to collect these service charges depended upon two things; First—Did the appellee agree to pay them? and second—Did the appellant render the service? Most of the exceptions reserved by the appellant relate to the question of whether the appellee agreed to pay service charges. Obviously, these exceptions cannot avail appellant anything if it didn't render the service.

Now, upon this question of whether it rendered the service, the evidence is all one way. Service, according to the admission of the Vice President of the appellant corporation, consists, among other things, in keeping a service man within call all the time so that if anything went wrong with the equipment all the Exhibitor had to do was to call for a service man to repair the equipment right away, and put it in running order. Now, there is not a scintilla of testimony tending to show that the appellant ever made the slightest attempt to render "service" as defined by its own Vice President. There was not a moment throughout the entire period preceding the commencement of this action, or at any other time for that matter, when ap-

pellant kept a service man on call at either Juneau or Ketchikan. In this connection it must be remembered that to keep a service man on call would not mean to keep a man in the Antarctic regions or some other remote place but to keep a man where he could be reached at any moment and from where he could come and service the equipment right away, without delay, so as to keep the show going. The most that appellant ever pretends to have done is to send a service man to Juneau and to Ketchikan periodically, whose business it was to inspect the equipment and to sell merchandise. These visits were made approximately once a month, not oftener than it would be required to send a salesman with a view of keeping the Exhibitors supplied with such articles of merchandise as appellant had to sell. It is not even pretended by appellant that any of these service men ever made any repairs to the equipment of Gross. The evidence is that the equipment was often out of repair and that the employees of Gross put it back into repair on each occasion; that at no time when there was a breakdown was one of appellant's service men to be had. Of course, they could have shut the show down and waited from a week to probably a month to get one of appellant's service men, but no theatre could be operated under those conditions, and that is not what is contemplated when we speak of rendering service. Mr. Wilcox says: "The service man is on call and comes right away." Upon this point there is no dis-

pute in the evidence. As a matter of law, therefore, no service was ever rendered by the appellant. If, as a matter of law, no service was ever rendered, then it follows as a matter of law that appellant had no right to collect for it, and it becomes entirely immaterial whether the appellee had ever agreed to pay for service or not.

Coming now to the other branch of the case which deals with the question of whether appellee had a right to recover under its counter-claims, the first question presented is whether appellee could recover the rental value of the equipment for the unexpired period of the lease between him and appellant. The undisputed evidence is that appellee had paid appellant something like Twenty One Thousand Dollars, in advance, for the use of the equipment during a period of ten years. While this amount had been paid in installments, the entire sum had been paid before the equipment was taken out under the writ of replevin. If the appellant had never rendered the service contemplated then it follows that it had no right to remove the equipment, and if not, the appellee certainly had a right to recover from it the money previously paid as rent for the equipment during the unexpired term. This is especially true since appellant admits in the complaint that the rental value of the equipment during that portion of the term is equal to the amount paid. In respect to none of these matters is there any dispute in the evi-

dence, so that appellee has a right to recover as a matter of law .

The next item that presents itself for consideration is the appellant's right to recover lost or anticipated profits. Upon this question also the evidence is uncontradicted, and the facts are established as a matter of law. No one denies that appellee had a going established and profitable business at the time the equipment was taken out. No one can deny that the taking out of the equipment would interrupt that business, and that there would be loss of profits, so that the only question remaining is the question of how much these lost profits amounted to. Upon this question, also, the evidence is uncontradicted. Appellee produced witnesses to show in dollars and cents just how much these profits amounted to, and not a single witness was called who contradicted the tesimony of these witnesses. True, Mr. Cooper found some mistakes in the additions, but upon re-checking the additions, appellee's witnesses found that Cooper's additions were correct, and the necessary corrections were made so as to accord with Cooper's calculations. This leaves the evidence where there was perfect agreement between the witnesses on both sides. True, Cooper made some calculations of what might have happened if the facts he assumed to be true were true; but these calculations were all based upon assumptions that were not established as facts in the case, and they do not in the slightest degree lead to any contradiction of the

evidence furnished by appellee upon the subject of lost profits. The jury's verdict in the case was for an amount much less than the amount to which appellee was entitled under the undisputed evidence. It must follow, as a matter of law, that appellee was entitled to recover at least as much for lost profits as he was awarded by the jury.

This only leaves a single item of damages to account for, and that is the question of whether appellee was entitled to recover monies expended in the attempt to reduce damages. Upon this point also the evidence is uncontradicted; it shows that appellee bought the best equipment available at that time to install in the place of the equipment that had been removed. The uncontradicted evidence shows that while this equipment was the best that could be had, it was nevertheless inferior equipment; that the sound was bad, and that as a result attendance became less and profits became smaller. The price paid for the equipment was shown in the evidence and was not contradicted. When the theatres were finally leased to Shearer this equipment had become entirely worthless, had no value either in the market or elsewhere, could not even be used for junk; and on this question also the evidence is all one way without contradiction. As a matter of law, therefore, the appellee had a right to recover for monies expended in this behalf.

Coming now to the question of whether the appellee had a right to recover the monies paid by him under duress, which is the only remaining item ,the evidence is all one way. The witnesses Gross and Cawthorne testified to the high pressure methods employed by the appellant in order to coerce the appellee and compel him to pay the monies sought to be recovered. And the witness Gage, produced by appellant, admits the essential features of this testimony. He admits that he told appellee that unless he paid the sums demanded he would not be permitted to continue the use of the equipment, and that he illustrated his statement by telling him about the way in which telephones were taken from the wall unless the telephone were paid for. This was the essential thing, for if the equipment were taken out it would follow that the business of Gross would be interrupted if not completely destroyed. Sound equipment cannot be taken out of a sound producing theatre without putting an end to the theatre's business, and the evidence of Gross is—and it is not contradicted—that at that time no other equipment could be had to take the place of the equipment if it were taken out. Under these circumstances, Gross had a right to recover the amounts paid, as a matter of law, and since there is no dispute about the amounts paid, he would have a right to recover the amount he did recover. From the foregoing it would follow that any exceptions reserved in connection with those

matters that relate to appellee's right to recover would become harmless and immaterial, for what the appellee had a right to recover under the uncontradicted evidence, he had a right to recover as a matter of law.

Then, too, the equities in the case are all in favor of the appellee. The high pressure methods employed by appellant may have been modern but they were not such as to raise any equities in its favor. From the first appellant coerced appellee by holding over his head the threat to remove the equipment. An action was brought to recover the service charges that form the basis of the present action and the appellee's box office's were attached. When appellee put up a bond to release the attachment he was again met with a threat that unless he paid the equipment would be disconnected. He asked that the question be tried out in court in the attachment suit—but no, proceedings were commenced to replevin the equipment. Again appellee begged for time to put up a bond, but the equipment was dismantled so that it could not be reassembled by appellee, so as to make a re-delivery bond useless. Appellee installed the newly acquired equipment, did his utmost to reduce the damages, set up his counterclaims, and offered the best proof possible under the circumstances of the damages sustained. Appellee's only defense is an attempted justification of the meth-

ods employed by it. The equities, as well as the law, are all one way, and we think they are such as to call for an affirmance of the judgment by the Court.

Respectfully submitted,

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